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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 634

DAVID DAUBE, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 23, 1933

CERTIORARI GRANTED MARCH 4, 1933

(37,331)

COURT OF CLAIMS OF THE UNITED STATES.

No. L-106.

David Daube v. United States.

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IN THE

Court of Claims of the United States

DAVID DAUBE, *Plaintiff*, v. THE UNITED STATES OF AMERICA, *Defendant.*	No. L-106.

I. PETITION.
(Filed March 28, 1930)

To the Honorable Judges of the Court of Claims:

The petitioner, David Daube, is an individual with residence and principal place of business at Ardmore, Oklahoma, and is a member of the co-partnership of Westheimer & Daube, doing business in Ardmore, Oklahoma.

I.

The petitioner seeks to recover from the United States of America, the sum of $24,780.14, with legal interest, being the amounts, respectively, of an overpayment illegally and erroneously credited against alleged additional taxes for 1916 of $2,019.25; and additional taxes of $4,449.50 for 1917; and $13,502.90 erroneously credited against an alleged additional tax of the co-partnership of Westheimer & Daube, by the Collector of Internal Rev-

enue; petitioner alleges upon information and belief, and so avers, that the Collector of Internal Revenue also credited $4,808.49 erroneously in some manner unknown to the petitioner.

II.

That under the provisions of an Act of Congress approved September 8, 1916, entitled An Act to increase the revenue and other purposes *(Ch. 439, 39 St. 756)*, the petitioner filed for the year 1916, his income tax return for the year 1916 in March 1917, and under date of June 11, 1917, paid the amount of tax shown thereon. On January 26, 1924, the Commissioner of Internal Revenue assessed an additional tax for the year 1916 against the petitioner in the amount of $2,019.25.

III.

That under the provisions of an Act of Congress approved October 3, 1917, and entitled An Act to provide revenue to defray war expenses and other purposes *(Ch. 63, 40 St. 300)*, petitioner filed his income and profits tax return for 1917 in April 1918, and on June 15, 1918, paid the amount shown thereon.

IV.

That under the provisions of the Act of Congress approved February 24, 1919, otherwise known as the Revenue Act of 1918, entitled an Act to provide revenue and for other purposes, the petitioner duly filed with the Collector of Internal Revenue for the District of Oklahoma, his return for the year 1918, not later than June 15, 1919, and paid the tax shown due thereon.

V.

On January 26, 1924, the Commissioner of Internal Revenue assessed an additional tax against the petitioner for the year 1917 in the amount of $4,449.50, and on or about the same date assessed an additional tax of $2,019.25 against the petitioner for the year 1916.

VI.

The Commissioner of Internal Revenue subsequently caused the petitioner's books of account and records to be audited, and after March 29, 1924, and as a result of a claim filed therefor, found that the petitioner had overpaid his taxes by $24,780.14 for the year 1918.

VII.

On some date subsequent to January 26, 1924, the Collector of Internal Revenue illegally and erroneously applied the said overpayment of $24,780.14 as follows, and the Commissioner of Internal Revenue on Schedule dated March 29, 1924, approved said credits:

Credit against an alleged additional tax for the year 1916 of	$2,019.25
Credit against an alleged additional tax for the year 1917 of	4,449.50

The petitioner is advised by counsel, and therefore avers, that there exists no warrant in law for the crediting of the said amount of $2,019.25 of the overpayment allowed by the Commissioner of Internal Revenue, against the alleged additional taxes of the petitioner for the year 1916; and also there exists no warrant in law for the crediting of $4,449.50 of the overpayment allowed by the Commissioner of Internal Revenue against the alleged additional taxes for the year 1917, for the reason that the

statute of limitations had run against the assessment and collection of said additional taxes at the time said credits were made by the Collector, more than five years having elapsed after the returns for 1916 and 1917 were filed.

VIII.

The co-partnership of Westheimer & Daube, of which the petitioner is a member, filed its income and profits tax return for the year 1917 in April 1918, and paid the amount of tax shown due thereon. In March, 1924, the Commissioner of Internal Revenue assessed an alleged additional tax against the partnership of $53,012.47, and on August 7, 1924, the Collector of Internal Revenue, on instructions in letter from H. F. Mires, Deputy Commissioner, applied Treasury check No. 43040 for $13,502.90, dated April 23, 1924, drawn to the order of David Daube, against the alleged additional tax of the co-partnership for the year 1917. A copy of said Treasury Department letter to the Collector as aforesaid, dated July 28, 1924, is appended hereto as Exhibit "A" and made a part of this petition by reference.

The petitioner is advised by counsel, and therefore avers, that there exists no warrant in law for the crediting of $13,502.90 of the said overpayment allowed by the Commissioner of Internal Revenue against the alleged additional 1917 tax of Westheimer & Daube, a partnership, for the reason that the statute of limitations had run against the assessment and collection of said additional taxes at the time said credit was made by the Collector, more than five years having elapsed after the partnership return for 1917 was filed.

IX.

Petitioner further alleges that although an overassessment of $24,780.14, as alleged, was allowed by the Com-

missioner of Internal Revenue, no part of said amount has been refunded up to the time of bringing this suit, although the Commissioner of Internal Revenue has been repeatedly requested to refund the said amount erroneously credited by the Collector of Internal Revenue against said alleged additional taxes claimed to be due.

X.

Petitioner further represents that he is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government, and that he is the sole and absolute owner of the claim herewith presented; that he has made no transfer or assignment of said claim, or any part thereof, and that petitioner is justly entitled to the amounts claimed herein from the United States, after allowing all just credits and set-offs.

Petitioner, therefore, prays for judgment in his favor and against the United States of America for the said sum of $24,780.14, with interest thereon, together with the costs and disbursements of this action, and for such other relief as may to this honorable Court seem just and proper.

JOHN E. HUGHES,
Attorney for Plaintiff,
844 Earle Building,
Washington, D. C.

District of Columbia—ss.

John E. Hughes, being first duly sworn, deposes and says that he makes this Affidavit as attorney for the petitioner in the above entitled case, and that the facts stated in the foregoing petition are stated upon information and belief, and he believes them to be true.

(Signed) John E. Hughes.

Subscribed and sworn to before me this 28th day of March, A. D. 1930.

(Signed) Lora Johnson,
Notary Public.

EXHIBIT "A"

TREASURY DEPARTMENT
Washington

A&C:CAP:R July 28, 1924

Collector of Internal Revenue,
Oklahoma City, Oklahoma.

Reference is made to your letter of June 10, (VCD: LW:A-Claims Div.) and also to a memorandum from the Income Tax Unit of the Bureau under date of July 14, a copy of which is enclosed, relative to Treasury check #432040, dated April 23, drawn to the order of David Daube, Ardmore, Oklahoma, for $13,502.90.

The check was issued in accordance with overassessments of $22,151.88 and $2,628.26, listed for refund on schedule IT:A:8285. The check has been returned by your office and has been deposited as a repayment to the appropriation from which drawn.

In this connection, you are authorized to apply this amount as a credit against an additional 1917 assessment of Westheimer & Daube, a partnership, appearing on your March 1924 list, page 1, line 7, special #17.

(Signed)
H. F. Mires,
Deputy Commissioner.

CrRr
Enclosure

II. General traverse. Filed May 6, 1930.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Charles B. Rugg,
Assistant Attorney General.

III. Argument and submission of case.

On May 4, 1932, this case was argued and submitted on merits by Mr. John E. Hughes, for plaintiff, and by Mr. Assistant Attorney General G. Aaron Youngquist, for defendant.

IV. History of proceedings.

On June 6, 1932, the Court filed findings of fact and conclusion of law and entered judgment in favor of the plaintiff in the sum of $2,628.26, with an opinion by Green, J., and concurring opinion by Littleton, J.

On June 9, 1932, the Court handed down the following order:

ORDER.

> On the Court's own motion, IT IS ORDERED this 9th day of June, 1932, that the judgment entered in the above-entitled cause June 6, 1932, be and the same is vacated and set aside, and that the opinion that day announced be and the same is withdrawn.

V. Special findings of fact, conclusion of law and opinion of the Court by Green, J., with dissenting opinion by Littleton, J. Filed July 5, 1932.

Mr. John E. Hughes for plaintiff. *Mr. William Cogger* was on the briefs.

Mr. Assistant Attorney General G. Aaron Youngquist, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for defendant. *Messrs. Lisle A. Smith* and *E. E. Angerine* were on the brief.

This case having been heard by the Court of Claims, the Court, upon the evidence adduced, makes the following

Special Findings of Fact.

The plaintiff herein, during all the period involved in this case, was a member of the partnership of Westheimer & Daube, doing business in Ardmore, Oklahoma, and on February 28, 1917, filed his individual income tax return for the calendar year 1916 with the proper collector of internal revenue.

On April 1, 1918, plaintiff filed his individual income tax return for the year 1917 with the collector, and on June 16, 1919, filed his income tax return for the calendar year 1918 with the collector, showing a tax liability for that year of $72,807.41, which was assessed and paid voluntarily without protest in the year 1919. Plaintiff also filed his individual income tax return for the calendar year 1920 with the collector on June 15, 1921.

On April 22, 1922, the plaintiff executed a waiver of assessment for the years 1916 and 1917, which was also signed by the Commissioner, and in the same month the copartnership of which plaintiff was a member also executed a waiver of assessment for the year 1917, which

was signed by the Commissioner. On November 10, 1923, the Commissioner mailed to the plaintiff a letter with a "statement" attached which showed that he had found that additional taxes were due from the plaintiff as follows: For the year 1916 in the sum of $2,019.25; for the year 1917 in the sum of $4,449.50; for the year 1920 in the sum of $4,808.49. Said statement showed also that there had been an overassessment for the year 1918 in the amount of $22,151.88, and for the year 1919, $2,628.26, and, further, that there was altogether a net overassessment of $13,502.90. A copy of this letter and the "statement" attached thereto is attached to the stipulation of the parties marked "Exhibit A" and made part hereof by reference.

On January 26, 1924, the Commissioner signed an assessment list for the district of Oklahoma in which appeared the additional assessments hereinabove referred to, and on January 31, 1924, the Commissioner signed a schedule of overassessments, which schedule showed an overassessment of taxes in favor of plaintiff for the year 1918 of $22,151.88, and for the year 1919 of $2,628.26. This schedule was sent to the collector with instructions to examine the accounts of the taxpayer and apply the overpayment as a credit against any taxes due, entering the same on the schedule, which the collector did, and after signing the schedule returned it to the Commissioner of Internal Revenue. It also showed that $11,277.24 of the overpayment of 1918 taxes was credited against additional assessments for 1916, 1917, and 1920 taxes. At the same time, the collector made out a schedule of refunds and credits dated February 27, 1924, which he forwarded to the Commissioner along with the schedule of overassessments. This schedule listed as refundable $10,874.64 out of the taxes paid for 1918, and $2,628.26 out of the taxes paid

for 1919. The Commissioner signed an approval of this schedule and an authorization of the payment thereof on March 29, 1924, notwithstanding the fact that he had on file directions to apply certain overpayments to the additional assessment against the partnership which he had previously informed plaintiff and the partnership would be made and which he did make on the same day (March 29, 1924) in the sum of $53,012.47 for 1917. Pursuant to this authorization, a check for $13,502.90, the amount of the overassessment, was issued on April 23, 1924, and forwarded to the collector for delivery to the plaintiff. The collector did not deliver the check but returned it. The evidence does not show directly why the collector returned the check, but it appears that on February 23, 1924, plaintiff and the other members of the partnership of Westheimer & Daube had individually signed and mailed to the Commissioner an instrument which contained, among other things, an agreement between themselves with reference to the disposition of overassessments to which they might be individually entitled and further authorized and requested the Commissioner—

> "* * * to apply and credit the amount refundable to each and all of the individual members of said partnership for 1918 against the additional tax assessed against said partnership for the year 1917 and this agreement to be taken and accepted as full and complete authority therefor."

In a prior paragraph of this agreement it recited that—

> "* * * the said partnership of Westheimer & Daube has been assessed an additional excess-profits tax of $53,012.47 as shown by Commissioner's letter dated February 11, 1924."

A copy of this agreement is contained in the stipulation signed by the parties in paragraph 15 thereof and is made a part hereof by reference. The collector was advised of this agreement.

After the return of the check, the Commissioner, on July 28, 1924, wrote again to the collector instructing him to apply the sum of $10,874.64, the balance of the overassessment for 1918, and also the sum of $2,628.26, overassessment for 1919, upon the taxes outstanding against the partnership for the year 1917, and the collector made such application accordingly. A copy of this letter is set out in paragraph 16 of the stipulation of the parties and is made a part hereof by reference.

On February 26, 1930, the plaintiff filed separate claims for refund for the years 1916, 1917, and 1918. These claims were in the amounts of $2,019.25, $4,449.50, $6,468.75, and $13,502.90, respectively. The amount last above stated included the overassessment for 1918 of $10,874.64 and the overassessment for 1919 of $2,628.26 hereinabove specified. No action has been taken by the Commissioner of Internal Revenue upon any of the claims thus filed.

Conclusion of Law.

Upon the foregoing special findings of fact, which are made part of the judgment herein, the Court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that his petition be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion.

GREEN, *Judge*, delivered the opinion of the Court:

The Commissioner of Internal Revenue having found that plaintiff had overpaid his individual income tax for

the years 1916, 1917, 1918, 1919, and 1920, credited the amount of such overpayments upon a deficiency in taxes of Westheimer & Daube, a firm of which the plaintiff was a member. There is no dispute as to the overpayment, the deficiency in the tax of the partnership, or the credits made by the Commissioner thereon, but plaintiff, claiming that the action of the Commissioner in making these credits was illegal, brings suit to recover the amount of the overpayments and credits. Since the filing of the petition, the plaintiff has abandoned his claim for the credits made from overpayments on the taxes of 1916, 1917, and 1920. The issue now is with reference to the credits made out of overpayments for 1918 and 1919.

With reference to the credits made of overpayments of the taxes for these two years, the contention for plaintiff is that the credits were made after the expiration of the period of the statute of limitations for the collection of taxes for the years on which these two overpayments were made. It is contended on behalf of the defendant that the credits were made before the expiration of the statutory limitations and that in any event the plaintiff is not entitled to recover for the reason that no application for a refund was filed within the time prescribed by law.

On the question of the statute of limitations the cases of *Florsheim Bros. Co. v. United States, 280 U. S. 453*, and *Northwestern Barb Wire Co. v. United States, 70 C. Cls. 329*, are cited on behalf of defendant to show that *section 278 (d) of the 1926 act* permitted the collection of the partnership tax at any time within six years from the time of the additional assessment against the partnership, which was on March 29, 1924. But in those cases it appeared that the statute of limitations had not expired when the act of 1926 went into effect.

In the case at bar the parties agree that the period of limitation for the collection of the partnership taxes for 1917 was extended by the so-called "unlimited" waiver which the partnership had filed to April 1, 1924, when it expired. Thus the period of limitation ended prior to the enactment of the 1924 act, which in *subdivision (d) of section 278* authorized the collection to be made within six years from the assessment of the tax. But in subdivision (e) of the same section, there was a provision that the section should not authorize the collection of a tax if at the time of the enactment of the act such assessment was barred by the statutory period of limitations properly applicable thereto. We are of the opinion that neither the revenue act of 1924 nor that of 1926 is of any help to defendant's case. See *Russell v. United States, 278 U. S. 181.*

The defendant contends that both of the claims of the plaintiff now at issue are barred by reason of the fact that no claim for refund as to either of them was filed until more than four years after the payment of the sum which is sought to be recovered. Plaintiff does not concede this to be the fact as to the claim for refund of the taxes of 1918, but argues that if it be a fact it is immaterial for the reason, as plaintiff claims, that one basis of the suit is the rendition of an account stated on which a suit may be commenced within the time of the rendition of the account notwithstanding the provisions with reference to the filing of claims for refund. In support of this position the plaintiff cites the case of *Bonwit Teller & Co. v. United States, 283 U. S. 258.*

The facts in the case present a very unusual situation and are quite different from those in the *Bonwit Teller case, supra*, where only one taxpayer was involved. It appears that on November 10, 1923, the Commissioner mailed

to the plaintiff a "statement" which showed that he had found that additional taxes were due from plaintiff for the years 1916, 1917, and 1920, and that for the years 1918 and 1919 there had been an overassessment, in each case specifying the amount, and that there was altogether a net overassessment of $13,502.90.

On January 26, 1924, the Commissioner signed an assessment list for the district of Oklahoma upon which appeared the additional assessments hereinabove referred to, and on January 31, 1924, the Commissioner signed a "schedule of overassessments," which schedule showed an overassessment of taxes in favor of plaintiff for the year 1918 of $22,151.88 and for the year 1919 of $2,628.26. This schedule was sent to the collector with instructions to examine the accounts of the taxpayer and apply the overpayment as a credit against any taxes due, entering the same on the schedule, which the collector did, and after signing the schedule returned it to the Commissioner of Internal Revenue. It then showed that $11,277.24 of the overpayment of 1918 taxes was credited against additional assessments of 1916, 1917, and 1920 taxes. At the same time, the collector made out a schedule of refunds and credits dated February 27, 1924, which he forwarded to the Commissioner along with the schedule of overassessments. This schedule listed as refundable $10,874.64 out of the taxes paid for 1918 and $2,628.26 out of the taxes paid for 1919. The Commissioner signed an approval of this schedule and an authorization of the payment thereof on March 29, 1924, notwithstanding the fact that he had on file an agreement and directions of plaintiff to apply certain of his overpayments to the additional assessment against the partnership which he had previously informed plaintiff and the partnership would be made. On the same day (March 29, 1924) the Commissioner made

partners were individually liable for the partnership taxes and that this gave defendant the right to credit the plaintiff's overassessment for 1919 on the partnership taxes, but it is not necessary to pass on the question thus raised, as our decision does not depend upon its determination.

It thus appears that an account stated necessarily includes all the claims that are made by the respective parties at the time of its presentation or rendition; that it applies not only to what may be admitted by one party but to cross demands made by the other which have no direct or even no indirect connection with the claim admitted by the other party, and the foundation of a suit thereon is that the balance is struck and agreed upon between the parties on their respective claims. The admission of one item in the account of the transactions between the parties offset by another item will not support an action on an account stated as to the item admitted, although it may constitute evidence of the correctness thereof in an action otherwise commenced. On the other hand, the presentation of an account admitting an item in favor of the party presenting it, but offsetting it by a claim upon an item against the party to whom the account was presented and striking a balance may, if no objection is made within a reasonable time, become an account stated for the balance so struck.

The authorities supporting these principles are so numerous that it is impractical to cite them within the reasonable limits of an opinion, and the decisions are so uniform and so universally accepted in their holdings that we see no necessity for making further reference to any of them.

It is not necessary in this case to decide whether all the principles laid down above apply to the facts in the case.

The first question to be determined is whether a statement of any kind was presented by defendant to plaintiff which showed the condition of the account between the parties, for the rule is absolute that unless some kind of an account or statement is presented or communicated by one party to the other which shows the balance due on the accounts between the parties, there is no foundation for a claim upon an account stated. Indeed this is so obvious that it would not need to be stated if it were not necessary in considering the evidence in this case, which fails to show the presentation of any account or instrument showing any amount due to plaintiff, or any agreement as to the balance due.

The only communication that the plaintiff received from the defendant which in any way pertains to the amount due is the so-called thirty-day letter written by the deputy commissioner to the plaintiff and dated November 10, 1923. There are several statements in this communication that we think show plainly that it cannot be considered as an account stated.

In the first place, the letter refers to a statement which is made part thereof, which clearly shows that nothing that was in the letter was intended as a final statement of the amount due on the account between the parties or even any items thereof. This statement made it plain that taken as a whole the communication was merely a recital of what was proposed to be done in the future and that it did not admit that any amount whatever was due plaintiff or would be due on the account between the parties when the proposed action should be taken. In fact the action which made the overassessment valid, and the assessment of the deficiency tax against the partnership were both done or made some time after the letter was written, and the whole proposition and the statement were all predi-

of money due him upon the taxes of another a situation results which is not covered by the revenue statutes but simply by the general law. In this particular case the application of the overpayment was made after the statute of limitations had run, but the statute then in force did not extinguish the debt due from the taxpayer. It merely abrogated the remedy. It is not necessary to decide whether the plaintiff could have recalled his direction to so apply the money at any time before the application was made. He did not do so, and when once the application had been made in accordance with plaintiff's directions the Government could retain the money provided there was any consideration for the transaction. The fact that the partnership still owed the money and the debt still existed was, as we think, sufficient consideration, and therefore the overpayment for 1918, which was covered by the instrument to which we have referred, cannot be recovered by the plaintiff regardless of the time when the claim for refund was filed or account stated was rendered. In fact the schedule never having been presented to plaintiff there was no occasion that he should indicate dissent or approval. When the 1918 refund was finally allowed a complete agreement existed between the Commissioner and the plaintiff as to what should be done with the overassessment, the Commissioner having previously stated what he intended to do and the plaintiff not only accepted the proposition of the Commissioner but directed the application in accordance therewith.

There remains the sum of $2,628.26, overpayment for the year 1919, to which no reference is made in the agreement and directions given by plaintiff, which we have considered above. The defendant contends that no claim for refund of the 1919 taxes having been filed, the deficiency assessment was properly made against the part-

nership within the time covered by the waiver filed by the partnership, that it had the right to apply the overpayment of plaintiff's taxes for 1919 on the partnership assessment, and that in any event the application for payment of refund is now barred by the statute of limitations. The petition recites that a Treasury check in the amount of $13,502.90, drawn to the order of plaintiff, was on August 7, 1924, applied by the collector against the additional assessment against the copartnership for the year 1917, and a letter from the Treasury Department reciting that this check had been returned by the collector and had been "deposited as a repayment to the appropriation from which drawn" is attached to the petition. Neither the collector nor the Commissioner applied the check which had been issued in favor of the plaintiff in the manner recited by the petition. It was simply turned back into the Treasury, and the transaction has been so fully explained in connection with the 1918 taxes that we need not recite the particulars any further. The petition does allege that on a schedule dated March 29, 1924, approved by the Commissioner, a credit was made of $4,449.50 against an alleged additional tax for the year 1917 out of the overpayments for 1918, and avers that such credit was without "warrant in law." But this has no reference to any overpayment of 1919. In argument counsel for plaintiff contend that under the holding in the case of *Bonwit Teller & Co., supra*, he is entitled to recover that portion of his taxes for 1919 which was applied on the partnership taxes. Plaintiff's claim is not definitely stated in the petition, but it is evident that he cannot recover even for the 1919 overpayment under the special provisions of the revenue act, for the reason that no claim for refund was filed. If he recovers at all it must be upon the theory that there was an account stated between the parties by virtue of the schedule signed by the Commissioner March

29, 1924, which, it is urged, under the *Bonwit Teller case,* gave the plaintiff six years in which to commence suit under the general statute applicable to claims against the Government. In considering whether there was an account stated between the parties upon which plaintiff may rest his case, it becomes necessary to consider the fundamental rules upon which such a case may be based.

The main principles with reference to an account stated are well settled and so far as we are able to ascertain no Court has ever varied from them. In a general way it is said:

> "An account stated is an agreement between parties who have had previous transactions of a monetary character that all the items of the account representing such transactions, and the balance struck, are correct, together with a promise, express or implied, for the payment of such balance." *1 C. J., p. 678, sec. 249,* citing numerous authorities.

It is of course necessary that some kind of a statement of the account must be rendered, *Idem, p. 679, sec. 250;* and there must be

> "an admission by one party of the correctness of the balance struck by the other, or some other evidence to show that the party sought to be charged has by his language or conduct admitted the correctness of the amount." *Idem, sec. 251.*

Of special importance is the rule that,

> "To constitute an account stated each party must understand the transaction as a final adjustment of the *respective demands* between them taken into consideration in the accounting." (Italics ours.) *Idem, p. 683, sec. 259.*

Also, that

> "To constitute an account stated, the correctness of the balance must receive the assent, express or implied, of both parties. A certain fixed sum must be admitted by the one party to be due to the other, and

> where there are mutual or cross demands, the parties must come to an agreement as to the allowance or disallowance of the items composing the account; there must be an adjustment, a balance struck, and an assent to the correctness of the balance." *Idem, p. 685, sec. 263.*

The right of action arises from the implied promise to pay which is based on this agreement.

It is not absolutely necessary that the account should be stated or the assent thereto given in writing. It is sufficient if it is so communicated that the minds of the parties can come to an agreement as to the balance due one or the other, and do come to such an agreement; but if the minds of the parties do not meet, there is no account stated.

It has also been held that

> "where an account rendered by one party to another is relied on by the latter to charge the former as regards items in favor of the latter, the account is to be taken as an entirety, and the account is evidence in favor of the former as to items therein in his favor." *Idem, p. 681, sec. 252.*
>
> "The parties cannot state an account by agreeing to part of the items, and leaving the others open for future adjustment or litigation." *Idem, p. 684, sec. 260,* citing *New York Fire Underwriters v. Bonghan, 97 N. Y. S. 402,*

holding that the test of an account stated is that the minds of the parties met as to the amount due.

Nor does it make any difference that a claim made in the account may be groundless, although if any part of the claim is disputed so that the balance stated is not admitted it does not become an account stated. *Columbia River Packing Co. v. Tallant, 132 Fed. 271.* It is contended in argument on behalf of the defendant that the

partners were individually liable for the partnership taxes and that this gave defendant the right to credit the plaintiff's overassessment for 1919 on the partnership taxes, but it is not necessary to pass on the question thus raised, as our decision does not depend upon its determination.

It thus appears that an account stated necessarily includes all the claims that are made by the respective parties at the time of its presentation or rendition; that it applies not only to what may be admitted by one party but to cross demands made by the other which have no direct or even no indirect connection with the claim admitted by the other party, and the foundation of a suit thereon is that the balance is struck and agreed upon between the parties on their respective claims. The admission of one item in the account of the transactions between the parties offset by another item will not support an action on an account stated as to the item admitted, although it may constitute evidence of the correctness thereof in an action otherwise commenced. On the other hand, the presentation of an account admitting an item in favor of the party presenting it, but offsetting it by a claim upon an item against the party to whom the account was presented and striking a balance may, if no objection is made within a reasonable time, become an account stated for the balance so struck.

The authorities supporting these principles are so numerous that it is impractical to cite them within the reasonable limits of an opinion, and the decisions are so uniform and so universally accepted in their holdings that we see no necessity for making further reference to any of them.

It is not necessary in this case to decide whether all the principles laid down above apply to the facts in the case.

The first question to be determined is whether a statement of any kind was presented by defendant to plaintiff which showed the condition of the account between the parties, for the rule is absolute that unless some kind of an account or statement is presented or communicated by one party to the other which shows the balance due on the accounts between the parties, there is no foundation for a claim upon an account stated. Indeed this is so obvious that it would not need to be stated if it were not necessary in considering the evidence in this case, which fails to show the presentation of any account or instrument showing any amount due to plaintiff, or any agreement as to the balance due.

The only communication that the plaintiff received from the defendant which in any way pertains to the amount due is the so-called thirty-day letter written by the deputy commissioner to the plaintiff and dated November 10, 1923. There are several statements in this communication that we think show plainly that it cannot be considered as an account stated.

In the first place, the letter refers to a statement which is made part thereof, which clearly shows that nothing that was in the letter was intended as a final statement of the amount due on the account between the parties or even any items thereof. This statement made it plain that taken as a whole the communication was merely a recital of what was proposed to be done in the future and that it did not admit that any amount whatever was due plaintiff or would be due on the account between the parties when the proposed action should be taken. In fact the action which made the overassessment valid, and the assessment of the deficiency tax against the partnership were both done or made some time after the letter was written, and the whole proposition and the statement were all predi-

cated upon the concluding words of the statement which are as follows:

> "The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district. If the tax in question has not been paid, the amount will be abated by the collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. *It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded since a portion may be an assessment which has been entered but not paid.*" (Italics ours.)

It will be observed that by this statement the taxpayer is not told that he will be paid the amount of any overpayment but that such overpayment will be credited on unpaid tax for other years, and it should be noted in this connection that it makes no difference as to whether the defendant had the right to credit this overpayment on the unpaid taxes of the partnership, as the defendant at the time was setting out its claims, and even if they were wrongfully made they constituted no admission that anything was due the plaintiff. Besides this, the plaintiff was specially warned by the portion of the statement italicized above that the overassessment should not be taken as any indication of the amount which would be credited to him or refunded. This language was evidently intended to make it clear to him that the letter and the statement constituted no acknowledgment of any indebtedness, and the subsequent proceedings on the part of the plaintiff show that he understood the statement just as it read.

It is true that by some oversight the Commissioner subsequently prepared a letter stating the amount of the

overassessment, which, with a check for the amount thereof, was sent to the collector. But the collector, perceiving the error, did not forward the check or the letter to the plaintiff but returned it to the Commissioner. Nothing was received by the plaintiff which pertained to the condition of the account between plaintiff and defendant except the letter of November 10, 1923, to which reference has been made above.

Although the letter last above referred to was the only communication from defendant to plaintiff with reference to the balance due on the accounts between the parties, there seems now to be some claim that the schedule of refunds and overassessments signed by the Commissioner on March 29, 1924, constituted an account stated. No such claim is set up by counsel for plaintiff in argument unless it be by a mere citation of the *Bouwit Teller case*, *supra*. In any event this schedule of refunds and credits was not presented to plaintiff. When it was forwarded to the collector he must have seen at once that an oversight had occurred. It not only was at variance with what the Commissioner had originally written plaintiff would be done, but if taken in the sense now claimed for it on behalf of the plaintiff it was absolutely contrary to the express directions which plaintiff himself had given to the Commissioner and of which the collector was advised. The collector therefore sent this schedule with the check for $13,502.90 back to the Commissioner and the Commissioner then directed the collector to credit the amount thereof against the 1917 assessment against the partnership of Westheimer & Daube. For so much of this credit as came out of the overassessment for 1918 ($10,874.64), the Commissioner had, as we have heretofore shown, express directions from the plaintiff to apply it on the partnership tax; for the remainder ($2,628.26), he did not

have any directions from the plaintiff as to how it should be applied, but it will be observed in this connection that the plaintiff had made no claim for its refund.

This muddle, which arose from the oversight of the Commissioner, resulted in what the evidence shows to have been an entirely erroneous statement of refunds and credits. By express direction of the plaintiff the greater part of this refund was, as we have already shown, to be applied on the partnership taxes. We think the evidence shows clearly that the schedule was issued by mistake, but in any event it utterly fails to comply with the requisites of an account stated. The plaintiff had never revoked his directions as to what should be done with the overassessment for 1918 and the minds of the parties had come to no agreement in relation thereto, or as to what should be done with the overassessment for 1919 with reference to which plaintiff had made no claim.

It should also be observed that the petition does not set forth a cause of action based upon an account stated. There is nothing in it referring to any statement of account received from the defendant. On the contrary, the action is based upon the allegation that the overpayments mentioned therein were illegally credited on the tax of Westheimer & Daube for the reason that the statute of limitations had run against the assessment and collection thereof at the time the credit was made and that claims have been filed for the refund thereof.

So far as the claim made by plaintiff that he is entitled to recover upon an account stated is concerned, the case is altogether different from that of *Bonwit Teller & Co., supra*. In that case a second count was set up in the petition which asked recovery on a certificate issued and delivered to the plaintiff stating the amount due, while in

the case at bar, as we have already seen, there is no allegation in the petition with reference to anything of the kind. No question was raised either in this Court or in the Supreme Court on the submission of the *Bonwit Teller case* as to whether the certificate upon which the second count of the petition was based constituted an account stated and the argument was confined to other points involved. Consequently neither Court passed upon the question as to whether this certificate was sufficient to constitute an account stated in favor of the plaintiff and it will be noted in this connection that the authorities cited as supporting a right to bring suit thereon, all refer to cases where a certificate had been issued by the proper authorities allowing plaintiff's claim, authorizing its payment, and plaintiff brought suit for the amount directly stated by the certificate to be due him. In our judgment the opinion of the Supreme Court is no authority for holding that the certificate issued in the *Bonwit Teller case* was an account stated. Be this as it may, we have, as we think, a firm ground for our decision on other matters. The letter in the *Bonwit Teller case* contained no warning to the plaintiff that nothing was decided thereby. It advised the plaintiff that a definite sum would be refunded or credited. In the case at bar, the 30-day letter in its final concluding statement notified the plaintiff that the whole matter was still undecided. In this connection it should be said that we do not think the fact that more than one year was taken into consideration in considering the accounts of the respective parties has anything to do with the principles relating to an account stated. Certainly no authority can be given for any such position. The underlying principle of an account stated is that it states the balance existing between the two parties and shows to which of the two parties this balance is due.

The cases that have been cited by counsel for plaintiff and others that have been called to our attention do not support the theory that an account stated was rendered in the case at bar. In each and all of them a claim was filed by the plaintiff for refund of the amount illegally collected. The claim as filed was approved in the full amount thereof and the approval certified by the proper officer. When a plaintiff presents a claim and it is allowed in full by the proper officer, manifestly the minds of the parties have met upon an account stated, and a promise to pay the amount agreed upon is implied. In the case at bar no claim whatever was filed for a refund of the overpayment on the taxes of 1919. In the case of *Bonwit Teller & Co., supra*, a claim was also filed by the plaintiff and there was a certification. But cases where the plaintiff presents a claim to the Government which is allowed and certified are no authority for upholding the action in such a case as the one at bar where no claim has been filed, no statement made by one party to the other, and there has been no meeting of the minds of the parties or agreement thereon, or any facts shown in evidence from which an agreement might be implied. An unbroken line of authorities, we think, should not be overruled in order to enable the plaintiff to recover a payment which in justice and equity was owing to the Government.

The plaintiff's petition must be dismissed and it is so ordered.

Whaley, *Judge;* Williams, *Judge;* and Booth, *Chief Justice*, concur.

Littleton, *Judge*, dissenting: I am unable to agree with the conclusion that the filing of a claim for refund prior to the allowance of an overpayment by the Commissioner of Internal Revenue is necessary to enable a taxpayer to

maintain a suit to recover an amount duly allowed by the Commissioner, pursuant to the provisions of the statute, during the period within which he may do so without the filing of a claim. The cause of action as stated in the petition, is based wholly upon the Commissioner's allowance of overpayments of $10,874.64 and $2,628.26 for 1918 and 1919, respectively. This allowance, which was made on March 29, 1924, was timely as to both years. Plaintiff had filed a timely claim for refund for 1918 which was allowed by the Commissioner. He filed no claim for refund for 1919, but the Commissioner allowed an overpayment of $2,628.26 for that year within the period of limitation in which he was required by the statute to examine the return and to refund or credit any overpayment found to have been made.

This suit is not based upon a claim for refund for 1918 or 1919, but is grounded upon the Commissioner's allowance of March 29, 1924, as evidenced by the schedule of refunds, Form 7805-A, approved by him on that date in the amounts sought to be recovered. There was no disallowance of a claim for refund and the two-year limitation provided in *section 3226, R. S.*, for suits upon rejected claims, does not apply. The Commissioner determined and allowed the amounts stated in the petition, and the petition was filed within six years from the date on which the amounts were allowed. The suit was, therefore, timely instituted.

In so far as concerns the Commissioner's allowance of the amounts involved and the nature of the plaintiff's cause of action, as stated in his petition, I can see no essential difference between this case and the case of *Bonwit Teller & Co. v. United States, 283 U. S. 258.* In that case the time for allowing an overpayment without a claim had expired but the Commissioner held that a cer-

cated upon the concluding words of the statement which are as follows:

> "The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district. If the tax in question has not been paid, the amount will be abated by the collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. *It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded since a portion may be an assessment which has been entered but not paid.*" (Italics ours.)

It will be observed that by this statement the taxpayer is not told that he will be paid the amount of any overpayment but that such overpayment will be credited on unpaid tax for other years, and it should be noted in this connection that it makes no difference as to whether the defendant had the right to credit this overpayment on the unpaid taxes of the partnership, as the defendant at the time was setting out its claims, and even if they were wrongfully made they constituted no admission that anything was due the plaintiff. Bsides this, the plaintiff was specially warned by the portion of the statement italicized above that the overassessment should not be taken as any indication of the amount which would be credited to him or refunded. This language was evidently intended to make it clear to him that the letter and the statement constituted no acknowledgment of any indebtedness, and the subsequent proceedings on the part of the plaintiff show that he understood the statement just as it read.

It is true that by some oversight the Commissioner subsequently prepared a letter stating the amount of the

overassessment, which, with a check for the amount thereof, was sent to the collector. But the collector, perceiving the error, did not forward the check or the letter to the plaintiff but returned it to the Commissioner. Nothing was received by the plaintiff which pertained to the condition of the account between plaintiff and defendant except the letter of November 10, 1923, to which reference has been made above.

Although the letter last above referred to was the only communication from defendant to plaintiff with reference to the balance due on the accounts between the parties, there seems now to be some claim that the schedule of refunds and overassessments signed by the Commissioner on March 29, 1924, constituted an account stated. No such claim is set up by counsel for plaintiff in argument unless it be by a mere citation of the *Bonwit Teller case, supra*. In any event this schedule of refunds and credits was not presented to plaintiff. When it was forwarded to the collector he must have seen at once that an oversight had occurred. It not only was at variance with what the Commissioner had originally written plaintiff would be done, but if taken in the sense now claimed for it on behalf of the plaintiff it was absolutely contrary to the express directions which plaintiff himself had given to the Commissioner and of which the collector was advised. The collector therefore sent this schedule with the check for $13,502.90 back to the Commissioner and the Commissioner then directed the collector to credit the amount thereof against the 1917 assessment against the partnership of Westheimer & Daube. For so much of this credit as came out of the overassessment for 1918 ($10,874.64), the Commissioner had, as we have heretofore shown, express directions from the plaintiff to apply it on the partnership tax; for the remainder ($2,628.26), he did not

cause of action accrues. Such allowance is *prima facie* evidence of the amount due and the burden is on the Government of showing fraud or mistake.

In the *Kaufman case* the suit was based upon the decision of the Commissioner allowing the claim. The Court held that the foundation of the suit was the refusal of the Government to pay a claim allowed by an officer authorized to repay monies overpaid under certain circumstances. It appeared that Kaufman applied to the Commissioner for a refund of $50 and submitted evidence in support of his application; that the Commissioner thereafter allowed the claim and held that Kaufman was entitled to a refund of $47.50, and advised the taxpayer of the allowance made. Subsequently payment of the amount allowed was refused on the ground that the claim for refund had not been filed in time. The Court said:

> "To say the least, the allowance of a claim under this statute [*3426, R. S.*] is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted. * * *, when submitted, and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached. When, therefore, the Court found the adjudication against the Government, without impeachment, the liability to pay was established."

United States v. Savings Bank, supra, was a similar case in which the Commissioner allowed an overpayment of tax, payment of which was later refused on the ground that the claim therefor had not been filed within two years as required by *section 3228, R. S.* The Court held that the allowance by the Commissioner was equivalent to an

account stated and binding on the United States, until in some appropriate form it was impeached for fraud or mistake, and that, if not paid on proper application, an action might be maintained on it in the Court of Claims, because it raised an implied promise on the part of the United States to pay; that if the officers of the department refused to pay the claim after it had once been allowed by the Commissioner, the allowance might be used as the basis of an action against the United States in the Court of Claims, where it would be *prima facie* evidence of the amount due and put on the Government the burden of showing fraud or mistake. To the same effect is *First National Bank of Greencastle v. United States, supra.* In this case plaintiff received information that the amounts had been allowed and that they had been credited against an additional tax due by the partnership of Westheimer & Daube for 1917. Thereafter plaintiff made application for the payment to him of the amounts allowed in respect of excess payments of tax for 1918 and 1919 on the ground that the credit made was barred by the statute of limitation and, therefore, illegal. Payment of the amounts allowed was refused. These facts bring the case within the rule laid down in the cases cited above.

The *Bonwit Teller case* is authority for the proposition that the binding effect of the Commissioner's allowance of an overpayment for a particular year is not affected by the fact that there may be an unpaid tax liability for another year which cannot be legally collected. In determining whether an allowance of an overpayment should be made for a particular taxable year the Commissioner cannot be governed by the fact that the taxpayer may not have paid the full amount of tax due for another taxable year. The statute is mandatory in its provision that the Commissioner shall determine the correct amount of tax

for each year. When he makes an allowance of an overpayment within five years after the return was due, there is an implied promise to pay notwithstanding the taxpayer has filed no claim for refund. See *Section 252 of the Revenue Act of 1921.* He is required by the statute to credit the excess payment to any tax that may be then due from the taxpayer for any other taxable period. But he cannot apply the allowed overpayment as a credit if the period of limitation within which he may make collection of the tax due for the other year has expired. If no tax is due by the taxpayer, or if the outstanding tax for another taxable year cannot legally be collected, because barred by the statute of limitation, the statute requires that the amount allowed "shall be immediately refunded to the taxpayer."

The liability of the taxpayer and the question whether he owes an additional tax or is entitled to a refund must be determined on an annual basis. In *Burnet v. Sanford & Brooks Co., 282 U. S. 359,* the Court said:

> "The net result of the two years, if combined in a single taxable period, might still be a loss; but it has never been supposed that that fact would relieve him from a tax on the first, or that it affords any reason for postponing the assessment of the tax until the end of a lifetime, or for some other indefinite period, to ascertain more precisely whether the final outcome of the period, or of a given transaction, will be a gain or a loss."

If, therefore, the Government was without authority under the revenue statute to apply all or any portion of the amounts allowed by the Commissioner in respect of the plaintiff's tax for 1918 and 1919 as a credit against a tax due by the partnership, there was an implied promise to pay the amount allowed, which was binding on the United States. Upon the refusal of the officials to pay such al-

lowance, it constituted a proper basis of an action against the United States.

On the merits I concur in the conclusion reached in the majority opinion to the extent that it holds that the plaintiff is not entitled to recover the amount of $10,874.64 allowed by the Commissioner for 1918. In view of plaintiff's agreement which the Commissioner had before him at the time he made the allowance for 1918, that

> "The Commissioner of Internal Revenue is hereby authorized and requested to apply and credit the amount refundable to each and all of the individual members of said partnership for 1918 against the additional tax assessed against said partnership for the year 1917, and this agreement to be taken and accepted as full and complete authority therefor."

the tax of the partnership for 1917, to the extent of the overpayment allowed for 1918, was satisfied and discharged when the Commissioner signed the schedule of refunds, Form 7805-A, on March 29, 1924. This action of the Commissioner was taken within the period of limitation as extended by the waiver within which he could collect by credit the additional tax due by the partnership for 1917. At the time the Commissioner signed the schedule allowing $10,874.64 for 1918, that amount legally belonged to the United States under his agreement and direction that it be retained in partial satisfaction of the liability of the partnership. The Commissioner's action in this case was not controlled by the credit provisions of the statute and the regulations, but was governed by plaintiff's agreement, the subject matter of which was the satisfaction of the 1917 tax of the partnership. It was not the usual claim for credit for 1918. The plaintiff filed with his agreement a claim for refund for 1918 which protected his right to secure an allowance thereof beyond the period within which the Commissioner could make an allowance without a claim. In the circumstances it was not

necessary so far as 1918 was concerned that the Commissioner take the formal steps usually taken in making a credit of an overpayment by the taxpayer against a tax due by him for another taxable year. Meticulous compliance with formalities customarily followed in making a credit is not necessary in every case. It is enough that the action taken is sufficient to accomplish a credit. Compare *Royal Bank of Canada v. United States, 70 C. Cls. 663, 44 Fed. (2d) 249.* In the usual case the collector of internal revenue, in making his report to the Commissioner pursuant to the directions appearing upon the schedule of overassessments, in respect of the tax of a particular taxpayer for certain taxable years, is not permitted to include in such report a statement of the account of another and different taxpayer. The Commissioner might have instructed the collector at the time the schedule of overassessment was transmitted to him to examine the account of the partnership for 1917 and make appropriate entries in the schedule of refunds and credits concerning the account of the plaintiff and the partnership and to distribute the overassessments according to the status of those accounts; however, in view of plaintiff's agreement, it was not necessary that he do so. It seems to be conceded by plaintiff that had the Commissioner so instructed the collector he would have no cause of action in view of the approval of the schedule of refunds on March 29, 1924. The language of plaintiff's agreement, however, made the Commissioner's action of March 29, 1924, effective as a credit of the amount allowed for 1918 against the tax due by the partnership. The letter of July 28, 1924, from the deputy commissioner of the accounts and collection unit of the bureau to the collector authorizing him to make appropriate entries in his records satisfying the partnership's liability for 1917 to the extent of $10,874.64, was not therefore the allowance of the credit. The credit had

already been legally accomplished and these instructions related only to matters of bookkeeping by the collector. Cf. *Meyersdale Fuel Co. v. United States, 70 C. Cls. 765, 44 Fed. (2d) 437.* As to the year 1919 however, the instructions contained in this letter constituted the only affirmative act by the Commissioner toward crediting the allowed overpayment of $2,628.26 against the tax due by the partnership. On the date the letter was written the collection of the tax for 1917 was barred.

The majority opinion denies recovery of the amount of $2,628.26 allowed by the Commissioner for 1919 on the ground that the Commissioner's allowance did not constitute an obligation of the United States and that the suit is prohibited by *section 3226, R. S.*, since plaintiff filed no claim for refund for 1919. I dissent from this conclusion for the reasons hereinbefore stated. Plaintiff did not file a claim for refund for 1919, however, the Commissioner allowed the overpayment of $2,628.26 for that year within the period of limitation within which he could do so without a claim. The return for 1919 was filed June 19, 1920, and there is no claim by defendant that it was due earlier. There was apparently an extension of time to file. The Commissioner's allowance, therefore, which is conceded to have been correct, was binding on the United States. The year 1919 was not included in plaintiff's agreement with reference to the satisfaction of the partnership tax and the action of the Commissioner on March 29, 1924, did not, therefore, constitute a credit of the amount allowed plaintiff for 1919 against the tax due by the partnership. The time within which he could legally have credited this overpayment against the partnership's tax expired April 1, 1924. I am of the opinion that judgment should be entered in favor of plaintiff for $2,628.26, with interest as provided in *section 177 of the Judicial Code*, as amended by *section 615 of the Revenue Act of 1928.*

Referred to in Court's finding on page 10.

EXHIBIT "A"

TREASURY DEPARTMENT
Washington

November 10, 1923

IT:PA:2
PFK-206:App
Mr. David Daube,
Ardmore, Oklahoma.
Sir:

An examination of your income tax returns and of your books of account and records for the years 1916 to 1920, inclusive, discloses an additional tax liability for the years 1916, 1917 and 1920 aggregating $11,277.24 and overassessments for the years 1918 and 1919 amounting to $24,780.14, as shown in detail in the attached statement.

In accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and to show cause or reason why this tax or deficiency should not be paid. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:PA:2 PFK-206:App.

Treasury Decision No. 3492, setting forth the privileges of taxpayers in cases of appeal, is attached for your information and guidance.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully,
J. G. Bright,
Deputy Commissioner.

by
Head of Division.

RWL-ps-2

Exhibit referred to in Court's findings on page 10.

Re: Crediting Overpayments 1918 tax due to each member of the partnership of Westheimer & Daube against additional excess profits tax assessed against said partnership for 1917.

To the Honorable,
The Commissioner of Internal Revenue,
Washington, D. C.
Sir:

WHEREAS, Max Westheimer, Samuel Daube and David Daube, the sole and only members of the firm of Westheimer and Daube, a partnership engaged in the general mercantile business, the production and sale of crude oil and operating and conducting a general farm and ranch business, together with incidental business relating to the general business of said partnership, with offices and principal place of business located at Ardmore, Carter County, Oklahoma, each, having been assessed additional income taxes for the years 1916 and 1917 and advised of an overpayment of taxes for 1918, in the following amounts:

Max Westheimer		
1916 Additional Tax.....	2,016.19	
1917 " "	4,373.88	6,390.07
1918 Overpayment		14,608.87
Leaving a net amount refundable of.....		$ 8,218.80

Copy of Commissioner's letter showing the additional tax due for 1916 and 1917 and the overpayment for 1918 is hereto attached and made a part hereof.

Samuel Daube

1916	Additional Tax	2,010.96	
1917	" "	5,254.83	7,265.79
1918	Overpayment		23,138.63

Net amount refundable for said years of..$15,872.84

Copy of Commissioner's letter showing the additional tax assessed and overpayment is hereto attached and made a part hereof.

David Daube

1916	Additional Tax	2,019.55	
1917	" "	4,444.59	6,464.14
1918	Overpayment		22,151.88

Leaving a net amount refundable of.....$15,687.74

Copy of Commissioner's letter showing the additional tax assessed and overpayment for 1918 is hereto attached and made a part hereof, and,

WHEREAS, the said partnership of Westheimer & Daube has been assessed an additional excess profits tax of $53,012.47 as shown by Commisisoner's letter dated February 11, 1924, a copy of which is hereto attached, and,

WHEREAS, it is desired by the above named individual members of said partnership to have the net amount refundable to each of the members of said partnership on account of the overpayment of taxes for 1918 as set forth and shown above, credited against the additional excess profits tax assessed against the partnership of said Westheimer & Daube for the year 1917, as hereinbefore set forth; that is to say, the additional tax assessed against said partnership for 1917 of.....$53,012.47 be credited with net overpayment refundable to each member of said partnership by reason of the overpayment of 1918 taxes, as follows:

Net amount refundable to Max Westheimer for the year 1918 of	8,218.80	
Net amount refundable to Samuel Daube of	15,872.84	
Net amount refundable to David Daube of	15,687.74	
or a total refundable to each and all of the members of said partnership for overpayment of 1918 income taxes of		39,779.38
which amount is asked to be applied as a credit or part payment of the excess profits tax assessed against said partnership for 1917, leaving a net balance due by said partnership for 1917 of		$13,233.09

NOW THEREFORE, in consideration of the premises the undersigned, Max Westheimer, Samuel Daube and David Daube, composing the sole and only members of said partnership of Westheimer & Daube, hereby agree and consent to the crediting of net amount refundable to each member of said partnership for the year 1918 to be applied and credited against the additional excess profits tax assessed against said partnership for the year 1917, and the Honorable, the Commissioner of Internal Revenue, is hereby authorized and requested to apply and credit the amount refundable to each and all of the individual members of said partnership for 1918 against the additional tax assessed against said partnership for the year 1917 and this agreement to be taken and accepted as full and complete authority therefor.

The members of said partnership have each prepared and filed herewith separate claims on Form 843 for the refunding of the net amount refundable to each of said members by reason of the overpayment of 1918 taxes, which is respectfully requested be allowed in full for the net amount refundable to each individual member of said partnership if it is held that the Commissioner of Internal Revenue cannot lawfully credit such amounts against

the additional tax assessed against said partnership for the year 1917 in the manner and for the purposes heretofore set forth, otherwise the claims for refund to remain in full force and effect.

IN WITNESS WHEREOF, the members of said partnership of Westheimer and Daube have each hereunto affixed his signature and seal on this the 23rd day of February, 1924.

Max Westheimer
Samuel Daube
David Daube
Members of the partnership of Westheimer & Daube of Ardmore, Oklahoma.

State of Oklahoma)
County of Carter) ss.

Before me, the undersigned authority, on this day personally appeared Max Westheimer, Samuel Daube and David Daube, to me known to be the identical persons who executed the above and foregoing agreement, and the said Max Westheimer, Samuel Daube and David Daube, each acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on this the 23rd day of February, 1924.

J. D. Garrett,
Notary Public in and for
Carter County, Oklahoma.

My Commission expires
September 25th, 1927.

Referred to in Court's findings on page 10.

16. On July 28, 1924, the Deputy Commissioner in charge of the Accounts and Collections Unit of the Bureau of Internal Revenue, addressed the following letter to the Collector:

"TREASURY DEPARTMENT
Washington

A&C:CAP:R July 28, 1924.
Collector of Internal Revenue,
Oklahoma City, Oklahoma.

Reference is made to your letter of June 10, (VCD: LW:A-Claims Div.) and also to a memorandum from the Income Tax Unit of the Bureau under date of July 14, a copy of which is enclosed, relative to Treasury check #432040, dated April 23, drawn to the order of David Daube, Ardmore, Oklahoma, for $13,502.90.

The check was issued in accordance with over-assessments of $22,151.88 and $2,628.26, listed for refund on schedule IT:A:8285. The check has been returned by your office and has been deposited as a repayment to the appropriation from which drawn.

In this connection, you are authorized to apply this amount as a credit against an additional 1917 assessment of Westheimer & Daube, a partnership, appearing on your March 1924 list, page 1, line 7, special #17.

(signed) H. F. Mires,
Deputy Commissioner."

CrRr
Enclosure.

VI. Judgment of the Court.

At a Court of Claims held in the City of Washington on the 5th day of July, A. D. 1932, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the Court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that his petition be and the same is hereby dismissed.

VII. Proceedings after entry of judgment.

On September 3, 1932, the plaintiff filed a motion for a new trial.

On September 30, 1932, the plaintiff filed a motion to amend motion for new trial.

On November 14, 1932, the Court filed the following opinion by Green, J., overruling plaintiff's motion for new trial:

VIII. Opinion of the Court by Green, J., overruling plaintiff's motion for new trial, and opinion by Littleton, J., referring to previous opinion. Filed Nov. 14, 1932.

Green, *Judge*, delivered the opinion of the Court:

The motion for new trial is based upon the statement that the Court erred in stating in the opinion that although the application of the overpayment was made after the statute of limitations had run, the statute then in force did not extinguish the debt due from the taxpayer, it merely abrogated the remedy. It is urged on behalf of plaintiff that *Bowers v. New York & Albany Lighterage Co., 273 U. S. 346*, held to the contrary. This is a mistake. The question for decision in that case, as expressly stated in the opinion, was whether *section 250 (d) of the act of 1921* barred collection by distraint proceedings begun after the expiration of the five-year period of limitation, and it was held that the word "proceeding" as used in this limitation clause "cannot be restricted to steps taken in a suit; it includes as well steps taken for the collection of taxes by distraint." The reversal by the Supreme Court in *273 U. S. 781*, of the *Toxaway Mills case (61 C.*

Cls. 363), a case which involved the construction of the same statute, did not amount to a decision that the statute barring the remedy extinguished the tax debt. In the *Toxaway Mills case*, the record showed that the tax was paid by reason of a demand made by the Government after the period of limitations had expired, and the only inference that can properly be made from the reversal is that the Supreme Court considered that a demand made by Government officials was a "proceeding" which was barred by the statute, the Court having held in the *Bowers case, supra*, that the word "proceeding" was "used broadly in reference to steps for the collection of taxes," and that its meaning was not limited to collection by suit.

The basic principle of these cases, as we understand it, is that where the Government, after the period of limitations has run, collects taxes by a proceeding forbidden by law, a suit can be maintained to recover back the money so paid. Obviously if this were not the case, the statutes so violated would be practically nullified in tax cases, as the taxpayer cannot enjoin proceedings to collect the tax but is compelled to bring suit to recover the money illegally taken from him. But no such situation is presented by the case at bar and, as we think, there was no statute in force during the period involved which could possibly be construed as extinguishing the debt when the period of limitations had run.

The argument made on behalf of plaintiff assumes that the case at bar is one in which the Government, after action to collect the tax was barred, initiated some kind of proceedings to obtain its payment. On the contrary, the plaintiff initiated proceedings to have money which belonged to him and was held by defendant applied on the tax debt. The direction to make the application was

made before the expiration of the statute of limitations. It is true that the period of limitation as to a part of plaintiff's taxes had expired when the application was made, but that does not alter the situation. The direction to apply the overpayments on the tax still unpaid had not been withdrawn. In the case of *Stange v. United States, 282 U. S. 270*, the Supreme Court, in affirming the decision of this Court *(68 C. Cls. 395)* held that a waiver filed after the period of limitations had expired was not ineffective, and that by reason of the waiver, money paid on a tax which was barred by the statute of limitations, could be retained by the Government. Such a holding would not have been made if the Supreme Court considered that the debt had been completely extinguished by the statute of limitations.

Language is quoted from the decision in *Mascot Oil Co. v. United States, 282 U. S. 434, 436*, which it is claimed supports plaintiff's contention because it contains a reference to the case of *Graham v. Goodcell, 282 U. S. 409*, as being one in which no "liability" existed on the part of the taxpayers after the statute of limitations had run. But the word "liability" has different meanings and must be construed in accordance with the context. We think it was not used by the Supreme Court in the case cited in the meaning given it by plaintiff. In financial matters the most common meaning of the word, according to the dictionary, is "that which one is under obligation to pay," and an "obligation" is also defined as "that which a person is bound to do or forbear." Plaintiff could not be compelled or obliged to pay the debt but the indebtedness still existed. The general rule in respect to debts is that "statutes of limitation are regarded as barring the remedy, and not as extinguishing the cause of action." *37 C. J., pp. 698-9, sec. 18.* In *Campbell v. Holt, 115 U. S. 620, 626*, the Supreme Court approved the rule that:

> "The statute of limitations only bars the plaintiff's remedy and not the debt, * * *."

In the absence of any special statutory provision which rendered it necessary to so hold, we do not think the Supreme Court intended to abrogate this time-honored doctrine everywhere recognized.

To avoid confusion it should be kept in mind that there are three different periods of limitation referred to in the former opinion: First, the 1918 taxes of plaintiff as to which the limitation expired before the date of the Commissioner's letter authorizing the collector, out of the overassessment of plaintiff's taxes for that year, to satisfy the partnership's liability for 1917 taxes to the extent of $10,874.64, but not until after the approval of the schedule of refunds on March 29, 1924; second, the period of limitations on plaintiff's tax for 1919 which did not expire until 1925 and as to which under no theory of the case did any bar exist during the period involved; third, the period of limitations as to the partnership's tax for 1917 under the waiver which expired April 1, 1924. As to the partnership's tax, it will be seen that at the time the credits were made upon it the period of limitations had run, but both the majority and the dissenting opinions, on account of the directions by plaintiff and the facts of the case (although for somewhat different reasons), considered that the Commissioner might properly apply the overpayment on the 1918 tax of plaintiff to the satisfaction of the partnership's tax at the time it was so done. With reference to the refund of $2,628.26 claimed on the taxes for 1919 we stated very fully in the original opinion why we considered that there was no account stated upon which suit could be brought, and further consideration has only strengthened our view that the holding heretofore made was correct.

The motion for new trial must be overruled, and it is so ordered.

Whaley, *Judge:* Williams, *Judge:* and Booth, *Chief Justice,* concur.

Littleton, *Judge:* I still hold to the views expressed in my opinion published at the time the opinion of the Court in this case was published, July 5, 1932.

I think a new trial should be granted as to the item of $2,628.26 for 1919 and denied as to the item of $10,874.64 for 1918.

COURT OF CLAIMS OF THE UNITED STATES.

No. L-106.

David Daube v. The United States.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the special findings of fact found by the Court; of the conclusion of law; of the opinion of the Court by Green, J.; of the dissenting opinion by Littleton, J.; of the judgment of the Court; of the proceedings after entry of judgment; of the opinion of the Court by Green, J., overruling plaintiff's motion for a new trial.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at Washington City this 27th day of December, A. D. 1932.

F. C. Kleinschmidt,
Assistant Clerk Court of Claims.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1933

The petition herein for a writ of certiorari to the Court of Claims is granted, limited to the question raised by the assessment for the year 1919.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.
FILED
JAN 23 1933
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1932.

No. 634

DAVID DAUBE,

Petitioner.

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,

WILLIAM COGGER,
Earle Building,
Washington, D. C.,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1932.

No.

DAVID DAUBE,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

JOHN E. HUGHES and WILLIAM COGGER, in behalf of DAVID DAUBE, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States.

JURISDICTION.

The original opinion of the Court of Claims is published in *59 F. (2d) 842*, and was rendered July 5, 1932. A motion for a new trial was filed and was overruled in a supplemental opinion rendered November 14, 1932, and which is published in *1 F. Supp. 771*.

QUESTIONS PRESENTED.

1. Is the petitioner barred from recovering an overpayment of tax allowed him by the Commissioner of Internal Revenue for the year 1919 and credited to an outlawed tax due from a partnership of which petitioner was a member without authority from petitioner, merely because petitioner did not file a claim for the refund of said overpayment for the reason that it was allowed by the Commissioner of Internal Revenue before the time for filing a claim for its refund had expired?

2. Is the petitioner precluded from recovering an overpayment allowed him by the Commissioner of Internal Revenue for the year 1918 (for which overpayment petitioner filed a timely claim for refund) which was credited to outlawed taxes due from a partnership of which petitioner was a member because petitioner had agreed in writing prior to the running of the Statute of Limitations that it might be credited to the partnership taxes, *but did not agree in said agreement that this might be done after the collection of said taxes was barred?*

STATEMENT.

The findings of fact made by the Court of Claims show that for the year 1919 petitioner was duly and regularly and before the Statute of Limitations for filing a claim for its refund had expired, allowed an overpayment of $2,628.26 income taxes for the year 1919. Without authority from the petitioner the Commissioner of Internal Revenue credited this overpayment against an outlawed tax due from a partnership of which petitioner was a member. Within six years from the allowance of said overpayment petitioner brought this suit against the United States to recover said overpayment and the Court of Claims denied recovery solely because petitioner did not file a claim for the refund of said $2,628.26 within five

years from the time his 1919 return was due. The Commissioner of Internal Revenue had, however, allowed it on March 29, 1924, and five years from the time the petitioner's 1919 return was due did not expire until March 15, 1925. For the year 1918 the Commissioner of Internal Revenue duly and seasonably allowed and the petitioner filed a proper and timely claim for the refund of an overpayment of $10,874.64. It will not be disputed, and the Court of Claims correctly held, that this was credited to outlawed taxes due from a partnership for 1918 of which petitioner was a member. These partnership taxes became outlawed April 1, 1924. The Commissioner signed the second schedule allowing the overpayment on March 29, 1924, and the credit was directed to be made by letter dated July 28, 1924, and actually made some time after that date. (This letter is contained in the record at page 42 and it shows that a Treasury Department check had actually issued and been sent to the Collector payable to the petitioner in the sum of $13,502.90, which was the total of the 1918 and 1919 overpayments.) The Court of Claims held that the petitioner could not recover the 1918 overpayment on the alleged ground that he had authorized its credit to the partnership taxes by a written agreement. This agreement is set forth in the record at pages 38 to 41 and is dated February 23, 1924 (more than a month before the Statute of Limitations would expire). It does not authorize this credit to be made after the Statute of Limitations had outlawed or extinguished the partnership tax and it contains the following provision:

> "The members of said partnership have each prepared and filed herewith separate claims on Form 843 for the refunding of the net amount refundable to each of said members by reason of the overpayment of 1918 taxes, which is respectfully requested be allowed in full for the net amount refundable to each individual member of said partnership if it is held

that the Commissioner of Internal Revenue cannot lawfully credit such amounts against the additional tax assessed against said partnership for the year 1917 in the manner and for the purposes heretofore set forth, otherwise the claims for refund to remain in full force and effect."

STATUTES INVOLVED.

The following are the provisions of law applicable to the questions presented in this case:

Revenue Act of 1928.

"Section 609. *Erroneous Credits.*

"(a) *Credit Against Barred Deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

* * *

"(c) *Application Of Section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act."

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Claims erred (1) in holding that the petitioner could not recover for 1919 because he did not file a refund claim for said year notwithstanding the overpayment had been duly and timely allowed by the Commissioner, and (2) in holding that the petitioner could not recover the 1918 overpayment because of the written agreement.

REASONS FOR GRANTING THE WRIT.

1. With respect to the year 1919 the decision in the present case denying recovery on the ground that a timely refund claim was not filed, is in conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in the case of *Wm. J. Friday & Co., Inc., v.*

United States, decided September 19, 1932, but not published in the Federal Reporter to date.

2. The second reason for granting the writ is that Judge Littleton is right when he states in his dissenting opinion in the case at bar, *59 F. (2d) 842, at page 850*, as follows:

> "In so far as concerns the Commissioner's allowance of the amounts involved and the nature of the plaintiff's cause of action, as stated in his petition, I can see no essential difference between this case and the case of *Bonwit Teller & Co. v. United States, 283 U. S. 258.*"

3. With reference to the year 1918, there is nothing in the agreement relied upon by the Court of Claims which authorized the Commissioner to credit the overpayment to taxes due from the partnership after their collection became outlawed. The agreement was made before the collection of these taxes was outlawed and the Commissioner had time before they became outlawed to make this credit but did not do so until afterwards. Furthermore, the agreement reserves the right to recover an unlawful credit in the extract therefrom quoted on page 4 of this petition.

4. Furthermore, the opinion of the Court of Claims gives an effect to this agreement which Congress after mature consideration deliberately refused to give, as is fully demonstrated in the brief in support of this petition.

Wherefore, it is submitted that this petition should be granted.

JOHN E. HUGHES,
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WILLIAM COGGER,
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Washington, D. C.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The reason why this writ should be allowed to review the judgment against the plaintiff with respect to the overpayment made by him for the year 1919 is fully set forth in the dissenting opinion of Judge Littleton. *(59 F. (2d) 842.)* (This record pages 27 to 36.) Petitioner submits this dissenting opinion to this Court as his brief in support of this petition. It is further submitted that this dissenting opinion is the result of years of experience in the administration of the Tax Law and years of consideration of the decisions of this Court and it is manifestly correct. To that opinion petitioner has only to add that the majority opinion in the case at bar as to the 1919 overpayment is squarely in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the *Friday case, supra.*

For the year 1918 recovery is denied solely on account of the agreement. This agreement is published in the record at pages 38 to 41, and if this Court upon reading the same can see anything in it which expressly allows the Commissioner to make a credit of the 1918 overpayment due the petitioner, to partnership taxes *after the said taxes have become outlawed*, then this writ should be denied. Otherwise it should be allowed. If the respondent can point out anything in the agreement to this effect, it ought to do so and some meaning should be attached to the provision in the agreement quoted on page 3 of this petition.

THE OPINION OF THE COURT OF CLAIMS GIVES AN EFFECT TO THIS AGREEMENT AND READS AN EXCEPTION INTO SECTION 609 OF THE REVENUE ACT OF 1928 WHICH CONGRESS AFTER MATURE CONSIDERATION DELIBERATELY REFUSED TO ENACT.

When the Revenue Act of 1932 was pending in Congress the Treasury Department, knowing that the case at bar and similar cases were pending in Courts, made an attempt to have Congress take them out of the operation of *Section 609 of the Revenue Act of 1928* and prevent the refund by legislation. The Department had (we submit correctly) held in *G. C. M. 6296*, published in *C. B. VIII-2, at page 152*, that a claim for credit was not within the scope of *Section 611 of the Revenue Act of 1928* and did not take the case out of the operation of *Section 607*, providing for the refund of all taxes paid after the Statute of Limitations had run. It attempted to have the case at bar, credit claim cases and similar cases covered by legislation.

When the Revenue Act of 1932, approved June 6, 1932, was under consideration by the Finance Committe of the Senate, *section 1107*, entitled "Credits of overpayments," was inserted as *amendment 262*, as follows:

> "(a) If any internal-revenue tax was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim was filed, or a request in writing made, for a credit against the tax so assessed of an amount claimed as an overpayment of internal-revenue tax, and if collection of any part of the tax so assessed was postponed, then (1) a credit (made prior to May 29, 1928) against the tax so assessed shall not be considered as void under the provisions of *section 609 (a) of the revenue act*

of 1928, relating to erroneous credits, and (2) the payment (made prior to May 29, 1928) of the part of the tax the payment of which was so postponed shall not be considered as an overpayment under the provisions of *section 607 of the revenue act of 1928*, relating to payments made after the expiration of the period of limitation on assessment and collection.

"(b) As used in subsection (a), the term 'tax' includes any interest, penalty, additional amount, or addition to any internal-revenue tax."

When the bill passed the Senate containing the above-quoted provisions and went to conference it was strenuously opposed by taxpayers affected, including the taxpayer in the case at bar, and the attorneys of such taxpayers, with the result that the Senate Finance Committee struck it from the bill and the following comment was contained on its striking in *Conference Report No. 1492, at page 29:*

"This amendment provides that in certain cases where, by reason of the filing of a claim or request for credit, the collection of an assessed tax was postponed, any credit against the tax so assessed shall not be considered void and any payment of part of the tax, payment of which was so postponed, shall not be considered as an overpayment; and the Senate recedes."

CONCLUSION.

Certainly this Court ought to review the conflict between the decisions of the Circuit Court of Appeals and also ought to review a decision essentially contrary to the decision of this Court in the *Bonwit Teller case*, and further this Court ought not to permit the Court of Claims by judicial legislation to read an exception into the Revenue Act of 1928 which Congress after mature consideration deliberately refused to include therein.

For any one of the foregoing reasons this writ should be granted.

All of which is respectfully submitted,

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Counsel for Petitioner.

FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1932.

No. 634

DAVID DAUBE,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

October Term, 1932.

No. 634

DAVID DAUBE,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF FOR PETITIONER.

May It Please The Court:

The opinion of the Court of Claims (R. 8-36) is reported in *59 F. (2d) 842.* The supplemental opinion of the Court of Claims (R. 43-47) is reported in *1 F. Supp. 771.*

On March 4, 1933, this Court granted the writ of certiorari to review the judgment of the Court of Claims with respect to the 1919 overpayment but denied the writ with respect to the 1918 overpayment.

QUESTION PRESENTED.

The question presented in this case is whether *Section 3226, R. S.*, bars the recovery of an overpayment duly and regularly and timely allowed by the Commissioner of Internal Revenue because the petitioner did not file a claim for the refund of said overpayment.

STATEMENT.

On March 29, 1924, within five years from the time petitioner's 1919 income tax return was due, the Commissioner of Internal Revenue signed the final schedule allowing petitioner an overpayment of $2628.26 for the calendar year 1919. On April 23, 1924, the Disbursing Clerk of the Treasury Department issued a check payable to the petitioner for the amount of this overpayment together with the amount of a 1918 overpayment with respect to which the writ was denied and forwarded this check to the Collector of Internal Revenue for delivery to the petitioner. The Collector of Internal Revenue did not deliver the check to the petitioner but returned it (R. 10) and after its return a Deputy Commissioner of Internal Revenue wrote the Collector the following letter (R. 6, 42):

"TREASURY DEPARTMENT
Washington

July 28, 1924

A&C:CAP:R
Collector of Internal Revenue,
Oklahoma City, Oklahoma.

Reference is made to your letter of June 10 (VCD: LW:A—Claims Div.) and also to a memorandum from the Income Tax Unit of the Bureau under date of July 14, a copy of which is enclosed, relative to Treasury check #432040, dated April 23, drawn to the order of David Daube, Ardmore, Oklahoma, for $13,502.90.

The check was issued in accordance with over-assessments of $22,151.88 and $2,628.26, listed for refund on schedule IT:A:8285. The check has been returned by your office and has been deposited as a repayment to the appropriation from which drawn.

In this connection, you are authorized to apply this amount as a credit against an additional 1917 assessment of Westheimer & Daube, a partnership, appearing on your March 1924 list, page 1, line 7, special #17.

(Signed)
H. F. Mires,
Deputy Commissioner.

CrRr
Enclosure"

On August 7, 1924, the Collector made on his books the credit of the overpayment of 1919 tax upon the taxes claimed to be due from a partnership of which the petitioner was a member, for the partnership's taxable year 1917 (R. 15). The parties agreed that the Statute of Limitations barred the Commissioner's right to collect the 1917 tax from the partnership on April 1, 1924 (R. 13).

The defendant contended that the plaintiff's suit was barred by *Section 3226 of the Revised Statutes* because the plaintiff did not file a claim for the refund of the 1919 taxes (R. 13).

> "The majority opinion denies recovery of the amount of $2,628.26 allowed by the Commissioner for 1919 on the ground that the Commissioner's allowance did not constitute an obligation of the United States and that the suit is prohibited by *section 3226, R. S.*, since plaintiff filed no claim for refund for 1919" (R. 36).

While the above statement embodies the gist of the case and is sufficient to present the question for decision, yet for a more complete understanding of the case the following facts should be added.

The petitioner was a member of the partnership of Westheimer & Daube, doing business in Ardmore, Oklahoma (R. 8). On June 16, 1919, petitioner filed with the Collector of Internal Revenue an individual income tax return for the calendar year 1918, showing a tax liability for that year of $72,807.41, which he duly paid (R. 8). In April 1922 this partnership executed a waiver of assessment for the year 1917 (R. 8-9), which expired April 1, 1924 (R. 13). Petitioner filed his 1919 income tax return on June 19, 1920 (R. 36).

On November 10, 1923, the Commissioner mailed to the petitioner a statement which showed that the Commissioner had found additional taxes due from the petitioner for the years 1916, 1917 and 1920, that for the year 1918 there had been an overassessment in the amount of $22,151.88, and for the year 1919 an overassessment in the amount of $2,628.26, and that there was altogether a net overassessment of $13,502.96 (R. 9). This letter granted the petitioner thirty days to file an appeal (R. 37). Apparently no appeal was filed because on January 26, 1924, the Commissioner signed an assessment list making the additional assessments referred to in this letter against the plaintiff and on January 31, 1924, he signed a schedule of overassessments scheduling the overassessments above referred to. This schedule was sent to the Collector with instructions to examine the accounts of the taxpayer and apply the overpayment as a credit against any taxes due, entering the same on the schedule, which the Collector did, and after signing the schedule returned it to the Commissioner of Internal Revenue. When returned it showed that $11,277.24 of the overpayment of 1918 taxes had been credited against the additional assessments for 1916, 1917 and 1920. This credit is not questioned in this case. At the same time the Collector made

out a schedule of refunds and credits, dated February 27, 1924, which he forwarded to the Commissioner along with a schedule of overassessments. This schedule listed as refundable $10,874.64 out of the taxes paid for 1918, and $2,628.26 out of the taxes paid for 1919 (R. 9).

The Commissioner signed an approval of this schedule and an authorization of the payment thereof on March 29, 1924 (R. 10). Pursuant to this authorization the check for $13,502.90, hereinabove referred to, was issued (R. 10).

On February 23, 1924, the petitioner and the other members of the partnership, Westheimer & Daube, signed and mailed to the Commissioner an agreement that the 1918 overpayment aforesaid might be applied against partnership taxes for the year 1917. The year 1919 was not mentioned in the agreement. Because of this agreement the Court of Claims denied recovery for the year 1918 and with respect to 1918 the writ was not granted so that the 1918 question is not present in the case.

ERRORS TO BE URGED.

The Court of Claims erred in holding that the petitioner was barred by *Section 3226 of the Revised Statutes* from recovering the 1919 overpayment because he did not file a claim for refund notwithstanding the said overpayment had been duly and timely allowed by the Commissioner of Internal Revenue.

STATUTES INVOLVED.

Section 252 of the Revenue Act of 1921 (Chap. 136, 42 Stat. at L. 268), which was in force at the time the Commissioner signed the final schedule allowing the 1919 overpayment and at the time the Treasury check to the order of the plaintiff was issued, reads as follows:

"*Sec. 252.* That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' the Act of October 3, 1913, entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of *section 3228 of the Revised Statutes*, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further*, That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further*, That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under *subdivision (a) of section 14 of the Revenue Act of 1916*, or filed prior to the passage of this Act under *section 252 of the Revenue Act of 1918*."

The above statute is applicable to the case at bar because the petitioner's 1919 return was not due earlier than March 15, 1920, and five years from that date did not expire until March 15, 1925. The overpayment for 1919 in the case at bar was allowed March 29, 1924, and the check for it was issued by the Treasury Department in the year 1924, well within the five-year period.

Section 3226 of the Revised Statutes, as re-enacted in *Section 1113 of the Revenue Act of 1926 (U. S. C. Title 26, Sec. 156)*, which was in force when this suit was brought, reads as follows:

> "*Sec. 3226.* No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Sections 607 and 609 of the Revenue Act of 1928 (Chap. 852, 45 Stat. at L. 791, 874, 875 U. S. C. Title 26, 2607) read in the applicable part as follows:

> "*Section 607. Effect Of Expiration Of Period Of Limitation Against United States.*—Any tax (or any interest, penalty, additional amount or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto, shall be considered an overpayment. * * *
>
> "*Section 609. Erroneous Credits.*
>
> "(a) *Credit Against Barred Deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under *section 607.*
>
> * * *
>
> "(c) *Application Of Section.*—The provisions of this section shall apply to any credit made before or after enactment of this Act."

THE ARGUMENT.

The Court Erred in Holding That the Provisions of Section 3226 of the Revised Statutes Were Applicable to This Case and That the Petitioner Could Not Recover Because He Had Not Filed a Refund Claim.

Petitioner respectfully submits to the Court that the statement of Judge Littleton in his dissenting opinion in the case at bar, *59 F. (2d) 842, at page 850* (R. 28), as follows:

> "In so far as concerns the Commissioner's allowance of the amounts involved and the nature of the plaintiff's cause of action, as stated in his petition, I can see no essential difference between this case and the case of *Bonwit Teller & Co. v. United States, 283 U. S. 258,*"

is manifestly correct.

The case of *Bonwit Teller & Co. v. United States, 283 U. S. 258,* is authority that *Section 3226 of the Revised Statutes* has no application to a suit for the recovery of an overpayment duly and seasonably allowed by the Commissioner of Internal Revenue. In the case of *Bonwit Teller & Co.*, the plaintiff's suit would have been barred if *Section 3226 of the Revised Statutes* was applicable, because the suit was not brought within five years after the date the overpayment was made. This Court, however, decided that this statute had no application to a case where the Commissioner had duly and seasonably allowed an overpayment. The Court said, in *283 U. S. 258, at page 265:*

> "The government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by *Rev. Stat. 3226*, as amended. *U. S. C. title 26, Sec. 156.* It provides that no suit for the recovery

of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. The action is not for the overpayment of the tax in 1919, but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. *United States v. Kaufman, 96 U. S. 567, 570, 24 L. ed. 792, 793; United States v. Real Estate Sav. Bank, 104 U. S. 728; 26 L. ed. 908; Bank of Greencastle's Case, 15 Ct. Cl. 225.* There is no merit in the contention that the suit is barred."

The Court of Claims held that the Commissioner's allowance of the overpayment in the case at bar did not constitute an account stated at common law. It is not and was not the contention of the petitioner that such allowance technically creates an account stated at common law, but it is and was the contention of the petitioner that by a series of decisions of this Court the Commissioner's allowance of the overpayment is the equivalent of an account stated and gives rise to a cause of action against the United States and a showing of this allowance makes a *prima facie* case. In *United States v. Kaufman, 96 U. S. 567*, which is cited and followed in the *Bonwit Teller Case, supra*, this Court said:

> "*To say the least, the allowance of a claim under this statute (3426, R. S.) is equivalent to an account*

stated between private parties, which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted. * * *, when submitted, and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached. When, therefore, the Court found the adjudication against the Government, without impeachment, the liability to pay was established." (Italics ours.)

In *United States v. Savings Bank, 104 U. S. 728*, the Court at page *733* said:

"And we held that the allowance of a claim by the Commissioner under this section, was equivalent to an account stated between private parties, and binding on the United States, until in some appropriate form it was impeached for fraud or mistake, and that if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, because such an allowance raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant."

Again the Court said:

"All we said then and all we say now is, that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the Commissioner, the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be estab-

> lished by competent evidence the same as any other fact in issue. An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an Act of Congress."

This Court plainly stated in the above case that the allowance by the Commissioner

> "may be used as a basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount which is due, and put on the Government the burden of showing fraud or mistake."

The United States, in its brief in opposition to the petition for the writ of certiorari, for the first time raised the point that "examination of the petition in the Court below clearly shows that petitioner made no attempt to plead an account stated," and on this basis it claims that petitioner should not recover.

In the case of *United States v. Kaufman, 96 U. S. 567*, this Court, speaking through Chief Justice Waite, at page *570* said:

> "And as against the Government there are no common law actions; any appropriate actions within the scope of the jurisdiction of the Court of Claims may be resorted to, unless specially prohibited."

Neither the statutes of the United States nor the rules of the Court of Claims require that common law pleading should be embodied in the petition in that Court. All that Rule 7 of the Court of Claims requires is "a plain statement of the facts". In paragraph 8 of its petition (R. 4) the petitioner pleaded the allowance of $13,502.90 and made a part of its pleading the Deputy Commissioner's letter directing the Collector to make the credit. This

letter (R. 6) plainly states the allowance of the overassessments "listed for refund on Schedule IT:A:8285". In paragraph 9 of the petition he alleged the allowance of the overassessments by the Commissioner of Internal Revenue (R. 4, 5). The United States did not demur to the petition and did not make any motion for an order to make it more definite and certain, but on the contrary, all the facts in the case at bar were stipulated and it entered into a written stipulation with the petitioner setting up all these facts and submitting the facts to the Court. It is too late now to claim that plaintiff cannot apply the law to the facts so stipulated because of an alleged defect in pleading. The legal theory of recovery need not be alleged. *Bemis Bros. Bag Co. v. United States*, ... *U. S.* .....

In the argument in the Court of Claims the plaintiff cited and relied upon the decision of this Court in the *Bonwit Teller Case* and it was not claimed by the Government that the petitioner could not recover under that decision because of any defect in his pleading. The Court of Claims did not deny recovery because it considered the pleading insufficient, but denied recovery for the reasons previously stated. As stated in the dissenting opinion (R. 30), the Court understood that

> "the plaintiff in this case bases his suit upon the Commissioner's allowance of the amount sued for, as evidenced by the Schedule of Refunds approved March 29, 1924."

In the words of this Court in the case of *United States v. Savings Bank, 104 U. S. 728, at page 733*, the approval of this schedule "raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant." It is upon this implied promise, thus raised, that the suit in the case at bar is brought, and the Court of Claims erred in holding that this allow-

ance did not raise an implied promise on the part of the United States to pay the amount allowed.

When the Commissioner signed his final schedule allowing the refund on March 29, 1924, it was then and there allowed under the decision of this Court in the case of *Girard Trust Company v. United States, 270 U. S. 163.* (See also *United States v. Swift & Company, 282 U. S. 468.)*

The signing of this schedule was the last connection the Commissioner had with this case. The facts show that the Collector and a Deputy Commissioner, both subordinate officers of the Department, prevented the delivery to the plaintiff of the check issued by the Commissioner's authority and undertook to credit part of the amount of it on an outlawed tax. Where the Commissioner has made an allowance the burden placed upon the Government

> "is not overcome by proving that some other officer in the subsequent progress of the claim through the Department declined to do what the law or Treasury regulations required of him before payment could be obtained." *(United States v. Savings Bank, 104 U. S. 728, at page 734.)*

For the reasons elaborately stated in the briefs for the petitioner and the briefs *amici curiae* in *Graham v. Goodcell, 282 U. S. 409,* we believe that the Statute of Limitations existing prior to the enactment of the Revenue Act of 1926 not only barred the remedy but extinguished the liability and it seems to be so stated by this Court in *Mascot Oil Company v. United States, 282 U. S. 434, at page 436.* But whether it did is immaterial in view of the fact that the Statute expressly provides that credits made after the Statute of Limitations has run shall be void and that payments made after the running of the Statute of Limitations shall be refunded.

The holding of the Court of Claims in the case at bar that a claim for refund must be filed seems to us to be squarely in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *William J. Friday & Company v. United States, 61 F. (2d) 370.*

CONCLUSION.

The approval of the Schedule of Refunds by the Commissioner on March 29, 1924, in the words of this Court in the case of the *United States v. Savings Bank, 104 U. S. 728, at page 733,* "raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant," and the fact that the Deputy Commissioner and the Collector prevented the payment of this money to the plaintiff is no defense, for, as this Court said in the same case, the burden of proof placed upon the Government by this allowance

> "is not overcome by proving that some other officer in the subsequent progress of the claim through the Department declined to do what the law or Treasury regulations required of him before payment could be obtained."

For the foregoing reasons the judgment of the Court of Claims should be reversed with directions to enter judgment for the petitioner for the amount of the 1919 overpayment.

All of which is respectfully submitted.

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Chicago, March 15, 1933.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1932.

No. 634

DAVID DAUBE,

Petitioner,

v.

THE UNITED STATES,

Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

May It Please The Court:

The Government in its brief states that the petitioner failed to plead an account stated and that this failure should not be overlooked because if it had pleaded an account stated the Government would have defended on the ground of mistake and that the opinion of the Court indicates that a mistake was made in the issuance of the schedule of overpayments in the case at bar.

In the case at bar no evidence by witnesses was offered. All the facts were stipulated and upon this stipulation the case was submitted to the Court. At the time this stipulation was entered into the Government notes in its brief the decision of this Court in the *Bonwit Teller case* was not rendered. Under the decision of the Court of Claims in that case the Government had a good defense to the suit for the recovery of the 1919 overpayment because it was not brought within five years of the date of the payment of the tax. Apparently it did not anticipate the reversal of that decision by this Court and having a good defense under that decision as it then stood, it is doubtful if it would have attempted to offer any evidence of mistake even if such evidence existed.

But this may be put to one side because there was no mistake in the case at bar with reference to the 1919 overpayment, which is the only one in issue here. The schedule signed by the Commissioner contained two items and they were, the item of $10,874.64 for 1918 and the item of $2,628.26 for 1919. With reference to the 1918 item the Court of Claims intimated that the schedule may have been issued by mistake because of the fact that an agreement was signed authorizing the application of this 1918 overpayment to the partnership's 1917 tax. This, however, *has no application whatever to the item of overpayment for the year 1919* because no agreement was signed with reference to that. There was obviously no possibility of mistake concerning the 1919 item.

As stated in our main brief and as noted by this Court in *Wisconsin Central Railroad Company v. United States, 164 U. S. 190, 212*, the rules of common law pleading do not obtain in the Court of Claims. All that is required is

a plain statement of the facts. Where these facts are stipulated by the Government without any objection being made to the pleadings it would seem apparent that any rule of law which will support recovery may be applied to the facts so stipulated. The right to recovery grows out of the facts and not out of the pleadings.

However, in the instant case the petitioner in its petition in paragraph eight thereof on page 4 of the Record, alleged the allowance of the overpayment of $13,502.90 by the Commissioner of Internal Revenue and the issuance of the Treasury check for this sum and alleged further "that there exists no warrant in law for the crediting of $13,502.90 of said overpayment *allowed by the Commissioner of Internal Revenue* against the alleged additional 1917 tax of Westheimer & Daube." Annexed to and made a part of this paragraph of the petition was a letter of the Treasury Department, which is contained on page 6 of the Record and which gives the number and amount of the check and the two items of the overpayment as well as the number of the schedule.

THE ALLOWANCE OF THE OVERPAYMENT BY THE COMMISSIONER OF INTERNAL REVENUE GAVE RISE TO THE CAUSE OF ACTION ON WHICH THIS SUIT WAS BROUGHT.

Petitioner maintains that it is the allowance of the overpayment by the Commissioner of Internal Revenue which gives rise to a cause of action in these cases and not the delivery of the Certificate of Overassessment by the Collector of Internal Revenue to a taxpayer, as contended by the respondent. The entire procedure in connection with the allowance of an overpayment is set forth by this Court in the case of *United States v. Swift & Company, 282 U.*

S. 468, at pages 471-474. With reference to the Certificate of Overassessment, the opinion at page 473 shows that it is prepared and mailed to the Collector of Internal Revenue with the refund check "to be by him mailed to the taxpayer."

When the Commissioner has signed the schedule for the second time and has mailed a Certificate of Overassessment to the Collector, he has done all that he can do in the matter. His action in allowing the overpayment creates the claim against the United States and not the action of the Collector in mailing notice of overpayment. In the case of *Bonwit Teller & Company, 283 U. S. 258,* the Court said at *page 265:*

> "The action is not for the overpayment of the tax in 1919, *but is grounded upon the determination* evidenced by the Certificate issued by the Commissioner May 12, 1927." (Italics ours.)

The Court will observe that it is the determination of the Commissioner upon which the action is grounded and that the Certificate of Overassessment (not its mailing to the taxpayer) is merely evidence of it. In the *Bonwit Teller case* the Court added:

> "Upon delivery of the Certificate to the plaintiff there arose the cause of action on which this suit was brought."

This last statement was unnecessary to a decision in the case and was dictum. Certainly the Court could not have meant by it that the mere failure of the Collector to mail a Certificate to the petitioner could deprive the petitioner of a cause of action based on the allowance of the claim by the Commissioner of Internal Revenue. The cases cited by the Court in the *Bonwit Teller case* and quoted from on pages 10-12 of our main brief do not state that the

delivery to a claimant of a Certificate of Overassessment is necessary to give rise to a cause of action. The *Kaufman case* states:

> "*The allowance of a claim* under this statute is equivalent to an account stated." (Italics ours.)

The case of *United States v. Savings Bank, 104 U. S. 728*, states at page *733*:

> "And we held that *the allowance of a claim by the Commissioner* under this section was equivalent to an account stated." (Italics ours.)

Nothing is said in that case or in the *Kaufman case* about the significance of the delivery of a Certificate of Overassessment being essential to the creation of a cause of action. Indeed, as will be fully pointed out on page 7 of this brief, no Certificate of Overassessment can be mailed to the taxpayer by the Collector until after the Disbursing Clerk of the Treasury Department has issued the check, for the reason that the Certificate of Overassessment is mailed to the Collector at the same time that the refund check is mailed to him. The Commissioner can only direct the Disbursing Clerk of the Treasury Department to issue the check. He cannot compel him to do so. As said in *United States v. Real Estate Savings Bank, 104 U. S. 728*:

> "Under *Section 3220* he is to 'refund' and 'pay back'. Payments of money in both cases must be made by the Accounting Officers of the Treasury Department as he is not himself a Disbursing Officer."

The Court then goes on to say at page 733 of its opinion in that case what is quoted on page 11 of our main brief, that if by reason of the refusal of the Disbursing Officer to pay the claim

> "after it has once *been allowed by the Commissioner, the allowance may be used as the basis of an action against the United States* in the Court of Claims where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake."

And again in that case the Court said with reference to the Commissioner's allowance, "such *allowance raised an implied promise on the part of the United States* to pay any amount that might actually be due the claimant." It is the allowance of the claim by the Commissioner that raises the implied promise and not the receipt in the mail by the taxpayer of the Certificate of Overassessment.

In the case at bar the procedure was the same as that stated in the *Swift & Company case, 282 U. S. 468*, except that it does not appear that the Certificate of Overassessment was mailed to the taxpayer. It does appear, however, from the opinion of the Court that one was issued. In that opinion the Court says in the last paragraph at the bottom of page 23 of the Record and at the top of page 24:

> "It is true that by some oversight the Commissioner subsequently prepared a letter stating the amount of the overassessment, which, with the check for the amount thereof was sent to the Collector. But the Collector perceiving the error did not forward the check or the letter to the plaintiff but returned it to the Commissioner."

In the *Swift case* this Court held that the limitation on the right of a taxpayer to file a refund claim began to run from the date of the approval of the final schedule. Nothing is said about it beginning to run from the date of the delivery of the Certificate of Overassesment to the taxpayer.

The issuance of the Certificate of Overassessment or even the payment of a refund does not prevent the Commissioner from changing his decision in the matter. By the recent Revenue Act he is allowed two years after making an erroneous refund to sue to get it back. Prior to that time the law apparently contained no limitation.

However, with respect to this 1919 overpayment in issue there was not an iota of evidence that the Commissioner ever would change his decision or that he ever did change his decision. The fact is that the Commissioner never changed his decision concerning it.

REPLY TO THE ARGUMENT THAT RECOVERY SHOULD BE DENIED BECAUSE NO CLAIM FOR REFUND WAS FILED WITHIN FIVE YEARS FROM THE DATE THE RETURN WAS DUE.

Section 252 of the Revenue Act of 1921 cited by the Government deals with the action of the Commissioner. So far as the Commissioner is concerned he has "allowed or made" a refund when he signs the final schedule of overassessments. *Girard Trust Company v. United States, 270 U. S. 163.*

All the Commissioner can do is allow a refund. He cannot pay the same. As stated in *United States v. Swift & Company, 282 U. S. 468*, at page *473:*

> "The Commissioner would certify the schedule of refunds, thus directing the disbursing clerk of the Treasury to draw checks for refunds shown on the schedule."

The Disbursing Clerk of the Treasury is not an employe of the Bureau of Internal Revenue and if he does not draw the check the Commissioner cannot compel him to do

so. This was recognized by this Court in the *Blair case* in the quotation on page 5 of this brief. However, in the case at bar the Disbursing Clerk of the Treasury did draw the check and issue it well within the five-year period.

By its argument the Government would have this Court construe the word "made" as used in *Section 252 of the Revenue Act* to mean "paid". If Congress had meant "paid" it could have said so. The rule of construction is stated in *Bonwit Teller & Company v. United States, 283 U. S. 258*, at page *263*, as follows:

> "The section is a part of a tax law giving to taxpayers opportunity to secure refund of overpayments that had become barred. Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide." (Citing cases.)

To hold this word to mean "paid" is to disregard the rule requiring it to be construed liberally in favor of taxpayers. The words of the statute are "no such credit or refund shall be allowed or made after five years from the date when the return was due." The word "allowed" in the statute is obviously used with reference to credits and the word "made" in the statute is used with reference to refunds. *Section 252* is placed in the statute solely to govern the actions of the Commissioner of Internal Revenue. As pointed out above, all the Commissioner can do is allow or make the refund. When he has done that he has exhausted his powers. He cannot pay it. One consequence of construing the word "made" in *Section 252* to mean "paid" would be to put credits and refunds on a different basis. A taxpayer is allowed a credit when the Commissioner signs the second schedule. *(Swift & Company case, 282 U. S. 468.)* There is no reason for distinguishing and discriminating between cases of credits and

cases of refunds. The significance of this was appreciated by the Court in *United States v. Swift & Company, 282 U. S. 468*, at page *476*, wherein it said:

> "This construction of the Act brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous."

One consequence of construing "made" to mean "paid" would be that if a check for refund was issued to taxpayer a few days before the end of the five-year period, but the taxpayer did not present it for payment until after the five-year period then the Treasury could not pay it. If the taxpayer lived in the Philippine Islands or Alaska, or was in Asia, it might be six months before the check would reach the Treasury Department for payment. Furthermore, *Section 252* is purely an administrative measure dealing with the Commissioner's office and it was not intended to regulate suits in Court which are regulated by *Section 3226 of the Revised Statutes* and as pointed out in our main brief this Court has held in the *Bonwit Teller case* that *Section 3226 of the Revised Statutes* has no application to a case where the Commissioner has made a timely allowance of a refund.

In *Sol. Op. 106*, published in Cumulative Bulletin No. 4 at page 339, the Treasury Department construes *Section 252*, with reference to credits and uses the words "made or allowed" as if they were synonymous.

It frequently happens that after the Commissioner has "made or allowed" a refund the Disbursing Clerk cannot obey the order to pay it for the reason that there is no appropriation available out of which to make the payment and it is necessary for the Disbursing Clerk to wait until Congress makes an appropriation for the payment of the

refund. The Commissioner's final action in the case, however, takes place when he signs the final schedule. After that he has nothing further to do with the case. So far as he is concerned he has "made" the refund when he signs the schedule.

The only importance of the refund claim in the case of *Bonwit Teller & Company, 283 U. S. 258*, was that if none had been filed the allowance of the Commissioner would have been made after the statute of limitations had barred the right of the Commissioner to make an allowance. As stated in the dissenting opinion of Judge Littleton:

> "In that case the time for allowing an overpayment without a claim had expired." (R. 28.)

In the last paragraph of its brief the Government states that the Court of Claims has not allowed recovery in any case based upon an account stated where a timely claim for refund was not filed. We may advise the Court that we know of no case in which the Court of Claims has allowed recovery in recent years based upon an account stated, regardless of whether a timely claim for refund was filed or not, except pursuant to the mandate of this Court in the *Bonwit Teller case*.

All of which is respectfully submitted.

JOHN E. HUGHES,
WILLIAM COGGER,
Counsel for Petitioner.

Chicago,
April 8, 1933.

FILE COPY

No. 634

In the Supreme Court of the United States

OCTOBER TERM, 1952

DAVID DAUBE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (R. 8–36) is reported in 59 F. (2d) 842. The supplemental opinion of the Court of Claims (R. 43–47) is reported in 1 F. Supp. 771.

JURISDICTION

The judgment of the court below was entered July 5, 1932. (R. 42.) Motion for new trial was overruled November 14, 1932. (R. 43.) The petition for a writ of certiorari was filed January 23, 1933. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an agreement by the petitioner that the amount of an overpayment of his 1918 tax should be credited by the Commissioner against a deficiency of a partnership for 1917, authorized the Commissioner to make such credit after the time for collection of the deficiency from the partnership had expired.

2. Whether petitioner may recover the amount of an overpayment of his tax for 1919 as on an account stated when no such ground of recovery was pleaded.

STATEMENT

The findings of the Court of Claims may be summarized as follows (R. 8–11):

During the period involved the petitioner was a member of the partnership of Westheimer & Daube, doing business in Ardmore, Oklahoma. (R. 8.) On June 16, 1919, petitioner filed with the appropriate Collector his individual income-tax return for the calendar year 1918, showing a tax liability for that year of $72,807.41, which was assessed and paid without protest. (R. 8.) In April, 1922, the partnership of which petitioner was a member executed a waiver of assessment for the year 1917, which was signed by the Commissioner. (R. 8, 9.) This waiver expired April 1, 1924. (See R. 13.) On November 10, 1923, the Commissioner mailed to the petitioner a statement which showed that the Commissioner had found additional taxes

due from petitioner for the years 1916, 1917, and 1920, that for the year 1918 there had been an overassessment in the amount of $22,151.88 and for the year 1919 an overassessment in the amount of $2,628.26, and that there was altogether a net overassessment of $13,502.90. (R. 9.) On January 26, 1924, the Commissioner signed an assessment list for the district of Oklahoma in which the additional assessments above referred to appeared. (R. 9.) On January 31, 1924, the Commissioner signed a schedule of overassessments which showed overassessments in favor of petitioner for the years 1918 and 1919 in the amounts referred to above. (R. 9.) The schedule was sent to the Collector with instructions to examine the taxpayer's accounts and to apply the overpayment as a credit against any taxes due. (R. 9.) The Collector entered a credit of $11,277.24 of the overpayment of 1918 taxes against additional assessments for 1916, 1917, and 1920 taxes, signed the schedule, and returned it to the Commissioner. (R. 9.) The validity of this credit is not contested by the petitioner as it was made in time as extended by waiver. Along with the schedule of overassessments the Collector forwarded to the Commissioner a schedule of refunds and credits, dated February 27, 1924, which listed as refundable to petitioner $10,874.64 of taxes paid for the year 1918, and $2,628.26 of taxes paid for the year 1919. (R. 9, 10.) On February 23, 1924, the petitioner and other members of the partnership each signed

an instrument which recited that the partnership had been assessed an additional excess-profits tax for the year 1917 in the sum of $53,012.47, and authorized and requested the Commissioner "to apply and credit the amount refundable to each and all of the individual members of said partnership for 1918 against the additional tax assessed against said partnership for the year 1917 and this agreement to be taken and accepted as full and complete authority therefor." (R. 10.) On March 29, 1924, the Commissioner made the additional assessment against the partnership for the year 1917, as he had by letter of February 11, 1924, informed the partnership he would do. (R. 10.) Also, on March 29, 1924, the Commissioner signed an approval of the schedule of refunds and credits which he had received from the Collector, and, in spite of the fact that the agreement of the partners requesting him to apply overpayments to the additional assessment against the partnership was on file, the Commissioner on the same day authorized payment to the petitioner of the amount shown by the schedule to be refundable. (R. 10.) On April 23, 1924, a check was issued for $13,502.90, the amount of the overassessment, and was forwarded to the Collector for delivery to the petitioner. (R. 10.) The Collector, however, returned the check to the Commissioner without delivering it to petitioner. (R. 10.) On July 28, 1924, the Commissioner by letter instructed the Collector to apply the sum of $13,502.90 (the

total balance of petitioner's overassessments for 1918 and 1919) upon the taxes outstanding against the partnership for the year 1917. (R. 11.) The Collector made such application accordingly. (R. 11.)

On February 26, 1930, petitioner filed separate claims for refund for the years 1916, 1917, and 1918. (R. 11.) One of the claims was for the sum of $13,502.90, which amount included the overassessment for 1918 of $10,874.64 and the overassessment for 1919 of $2,628.26. (R. 11.) No action on these claims was taken by the Commissioner. (R. 11.)

No separate claim for refund for the year 1919 was ever filed by petitioner.

On March 28, 1930, petitioner brought an action in the Court of Claims to recover the sum of $24,780.14, with interest, but as noted above, abandoned part of the claim, and sought to recover the overassessment for the year 1918, $10,874.64, and the overassessment for the year 1919, $2,628.26, a total of $13,502.90, with interest. (R. 12.) The basis of the suit was that the action of the Commissioner in crediting the overpayments against taxes due from the partnership for the year 1917 was unlawful because the collection of 1917 taxes was barred by the statute of limitations after April 1, 1924, when the waiver of assessment expired. (R. 4, 12.) The Court of Claims denied recovery and dismissed the petition. One judge concurred in the result as to the overassessment for 1918, but

dissented as to the overassessment for 1919. (R. 27.)

ARGUMENT

I

The petitioner contends that the Court of Claims erred in holding that the Commissioner's action in crediting his 1918 overassessment against the additional tax liability of the partnership for 1917 was authorized by the agreement of February 23, 1924, asserting that this agreement did not authorize the making of such credit after the statutory period for collection of the partnership tax had expired. The agreement contained no express provision with regard to the time within which the credit might be made. By its terms the Commissioner was

> authorized and requested to apply and credit the amount refundable to each and all of the individual members of said partnership for 1918 against the additional tax assessed against said partnership for the year 1917 and this agreement to be taken and accepted as the full and complete authority therefor. (R. 40.)

We believe that the court below correctly concluded that the Commissioner was not constrained by this agreement to make the authorized credit before the time for collection against the partnership expired. Provisions in the Revenue Acts for the time within which a "credit" may be made have no application, for this was not a credit against the taxpayer's liability, but a separate agreement providing for the application of sums due to him, to

the liability of another. Such an agreement is not dealt with in the Revenue Acts and its proper effect must depend upon its own terms, which, as stated, did not limit the time within which the Commissioner could act under it. The reference to the separate claim for refund filed by petitioner in connection with the same taxes in the penultimate paragraph of the agreement (R. 40) does not, as petitioner contends, indicate that the Commissioner's authority under the agreement was to expire at the end of the statutory period for collection. The paragraph in question shows that the sole purpose of the claim for refund was to protect the taxpayer in the event the Commissioner should conclude that the law did not permit him to apply an overpayment of an individual's tax against a deficiency of the partnership. Obviously it was not, as petitioner contends, an ultimatum to the Commissioner to make the application within the short time remaining before the statute would run.

The agreement here involved was apparently designed to benefit the petitioner by relieving the partnership from demands for payment in cash of a large part of its deficiency. The petitioner has obtained the benefit of the agreement and, even if the meaning of its provisions were doubtful, should not be heard to contend for a strained construction of its terms after the Commissioner has relied upon it and the period for collection of the partnership tax has been allowed to expire. (Cf. *Naumkeag*

Steam Cotton Company v. *United States,* C. Cls. No. L–327, decided January 9, 1933, not yet reported; *Ralston Purina Company* v. *United States,* C. Cls. No. L–506, decided June 6, 1932, not yet reported.)

Petitioner's contention that the result reached below conflicts with the intent of Congress as reflected in the rejection of the proposed amendment No. 262 to the Revenue Law of 1932 is without merit. That amendment, which is set forth on pages 7–8 of petitioner's brief, clearly related to "credits" in the ordinary sense (that is, against the same taxpayer's liability) and not to extra-statutory agreements between the taxpayer and the Commissioner.

The question presented as to the propriety of the Commissioner's application of petitioner's overassessment for 1918 against the partnership liability involves only the interpretation of a particular agreement which has been properly construed below. There is no conflict of decisions on the question, and it obviously does not merit review by this Court.

II

The petitioner also seeks review of the decision below denying recovery of petitioner's overassessment for the year 1919, which was also applied by the Commissioner to the partnership liability. Apparently conceding that there was no timely claim for refund which would permit maintenance

of the suit as one for taxes wrongfully collected and withheld, petitioner now asserts the right to recover on an account stated. The court below held that no such ground for recovery was pleaded (R. 25) and that, in any event there was no basis for recovery on that theory. Examination of the petition in the court below clearly shows that petitioner made no attempt to plead an account stated and it does not appear that there was any request to amend the petition. There is therefore no basis for considering this contention of petitioner.

Petitioner appears to rely on the signing of the schedule of refunds and credits as constituting an account stated. Both the record and the opinion below imply that the Commissioner signed the schedule of refunds and credits by mistake. (R. 10, 14, 15, 23, 24.) The failure of petitioner to plead an account stated can not be disregarded, for it is apparent that the case below was tried on the basis of the pleadings as framed, and the Government can not now be expected to meet a claim to which the proofs were not directed. While the court below placed its decision on this question in part upon the ground that even disregarding the form of the pleadings, there was, upon the facts, no account stated, we deem it unnecessary to discuss the merits of the question for we believe it can not be considered on this record.

There is no basis for petitioner's claim that there is a conflict between the decision below and *Bonwit-*

Teller & Co. v. *United States,* 283 U. S. 258, and *Wm. J. Friday & Company* v. *United States,* 61 F. (2d) 370 (C. C. A. 3d). In the *Bonwit-Teller case* this Court held that the cause of action arose upon the delivery to the taxpayer of a certificate of overassessment, and in the *Friday case* the *Bonwit-Teller* decision was interpreted as requiring the taxpayer to "aver and prove as a substantive material fact" delivery of such certificate in order to prevail. Here the delivery of a certificate of overassessment was neither pleaded, proved, nor found. There is no basis in the record for review of the question in this case.

CONCLUSION

The decision of the court below was correct. There is no conflict of decisions and, upon this record, no question worthy of review is presented. The petition should be denied.

Respectfully submitted.

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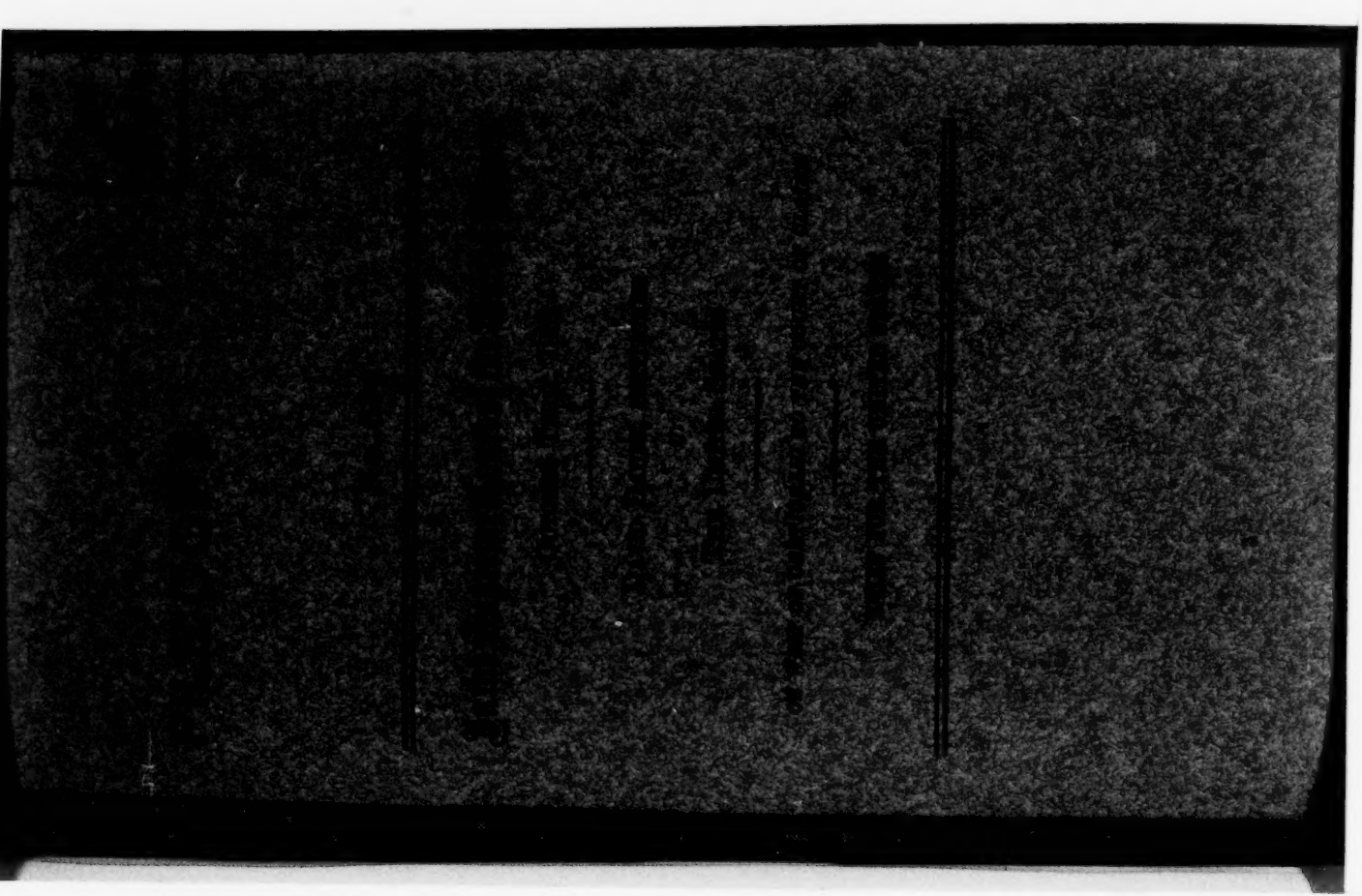

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 634

DAVID DAUBE, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims (R. 8–36) is reported in 59 F. (2d) 842. The supplemental opinion of the Court of Claims (R. 43–47) is reported in 1 F. Supp. 771.

JURISDICTION

The judgment of the court below was entered July 5, 1932 (R. 42). Motion for new trial was overruled November 14, 1932 (R. 43). The petition for certiorari was filed January 23, 1933, and granted March 4, 1933, " limited to the question raised by the assessment for the year 1919." The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an account stated was pleaded.

2. Whether under the circumstances of this case there may be recovery on an account stated.

3. Whether, if there was an account stated, there may be recovery in the absence of a timely claim for refund.

STATUTES INVOLVED

The applicable provisions of the statutes involved are contained in Appendix, *infra*, pp. 29–22.

STATEMENT

The findings of the Court of Claims may be summarized as follows (R. 8–11):

During the period involved the petitioner was a member of the partnership of Westheimer & Daube, doing business in Ardmore, Oklahoma (R. 8). On June 16, 1919, petitioner filed with the appropriate Collector his individual income-tax return for the calendar year 1918, showing a tax liability for that year of $72,807.41, which was assessed and paid without protest (R. 8). In April 1922 the partnership of which petitioner was a member executed a waiver of assessment for the year 1917, which was signed by the Commissioner (R. 8, 9). This waiver expired April 1, 1924. (See R. 13.) On November 10, 1923, the Commissioner mailed to the petitioner a statement which showed that the Commissioner had found additional taxes due from petitioner for the years 1916, 1917, and 1920, that for the year 1918 there had been an overassessment in the

amount of $22,151.88 and for the year 1919 an overassessment in the amount of $2,628.26, and that there was altogether a net overassessment of $13,502.90 (R. 9).

On January 26, 1924, the Commissioner signed an assessment list for the district of Oklahoma in which the additional assessments above referred to appeared (R. 9). On January 31, 1924, the Commissioner signed a schedule of overassessments which showed overassessments in favor of petitioner for the years 1918 and 1919 in the amounts referred to above (R. 9). The schedule was sent to the Collector with instructions to examine the taxpayer's accounts and to apply the overpayment as a credit against any taxes due (R. 9).

The Collector entered a credit of $11,277.24 of the overpayment of 1918 taxes against additional assessments for 1916, 1917, and 1920 taxes, signed the schedule, and returned it to the Commissioner (R. 9). The validity of this credit is not contested by the petitioners, as it was made in time as extended by waiver. Along with the schedule of overassessments, the Collector forwarded to the Commissioner a schedule of refunds and credits, dated February 27, 1924, which listed as refundable to petitioner $10,874.64 of taxes paid for the year 1918, and $2,628.26 of taxes paid for the year 1919 (R. 9, 10).

On March 29, 1924, the Commissioner made the additional assessment against the partnership for

the year 1917, as he had by letter of February 11, 1924, informed the partnership he would do (R. 10). Also, on March 29, 1924, the Commissioner signed an approval of the schedule of refunds and credits which he had received from the Collector, and on the same day authorized payment to the petitioner of the amount shown by the schedule to be refundable (R. 10). On April 23, 1924, a check was issued for $13,502.90, the amount of the overassessment, and was forwarded to the Collector for delivery to the petitioner (R. 10). The Collector, however, returned the check to the Commissioner without delivering it to petitioner (R. 10).

On July 28, 1924, the Commissioner by letter instructed the Collector to apply the sum of $13,502.90 (the total balance of petitioner's overassessments for 1918 and 1919) upon the taxes outstanding against the partnership for the year 1917 (R. 11). This instruction was given because the petitioner and other members of the partnership had on February 23, 1924, signed an agreement which authorized the Commissioner to credit the amount refundable to the individual partners for the year 1918 against the additional tax assessed against the partnership for the year 1917 (R. 10). The Collector made such application accordingly (R. 11).

On February 26, 1930, petitioner filed separate claims for refund for the years 1916, 1917, and 1918 (R. 11). One of the claims was for the sum of

$13,502.90, which amount included the overassessment for 1918 of $10,874.64 and the overassessment for 1919 of $2,628.26 (R. 11). No action on these claims was taken by the Commissioner (R. 11). No separate claim for refund for the year 1919 was ever filed by petitioner.

On March 28, 1930, petitioner brought an action in the Court of Claims to recover the sum of $24,780.14, with interest, but as noted above, abandoned part of the claim, and sought to recover the overassessment for the year 1918, $10,874.64, and the overassessment for the year 1919, $2,628.26, a total of $13,502.90, with interest (R. 1). The basis of the suit apparently was that the action of the Commissioner in crediting the overpayments against taxes due from the partnership for the year 1917 was unlawful because the collection of 1917 taxes was barred by the statute of limitations after April 1, 1924, when the assessment waiver expired (R. 4, 12). The Court of Claims denied recovery and dismissed the petition. One judge dissented as to the overassessment for 1919, but concurred as to the overassessment for 1918 (R. 27).

The petition for certiorari was granted limiting review to the question presented by the assessment for the year 1919. It may be conceded for present purposes that the Commissioner's action in applying the overpayment for 1919 to the partnership liability was unauthorized.

SUMMARY OF ARGUMENT

The petitioner failed to plead a cause of action on an account stated in its petition in the court below. Recovery upon that ground was first urged in argument. There are no facts alleged in the petition on which a judgment on this theory could be based. The question should not be considered in this case. The defect in pleading should not be disregarded, since it obviously induced the defendant not to make proof of mistake which it otherwise might have done.

If the defective pleading could be disregarded, on the merits there is no basis for recovery on an account stated against the United States. Under *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, an action arises upon the delivery to the taxpayer of the Commissioner's certificate of overassessment, as an account stated. No certificate of overassessment was delivered to the petitioner here. Upon principle, nothing short of the delivery of a certificate of overassessment can constitute an account stated. The Commissioner's approval of the schedule of refunds and credits, upon which petitioner relies, was not communicated to the petitioner, and at least until delivery of a certificate of overassessment, the Commissioner retains authority to change his action. No liabilty upon an account stated could arise upon the approval of such a schedule, for it involved no rendition of an account to the taxpayer and no implied promise that the

schedule approved by the Commissioner was correct or that the United States would pay the amounts shown upon the schedule as overpayments.

If approval of the schedule of refunds and credits could be regarded as constituting a statement of an account, there could be no recovery here, because the petitioner failed to file a claim for refund within five years after the return was due, as required by Section 252 of the Revenue Act of 1921. That Act limited the authority of the Commissioner to allow refunds after five years in the absence of a claim for refund, and forbade the payment of such refunds after that time. Payment of a refund is made if liability upon an account stated is enforced after the five-year period has elapsed, and the fiscal necessities of the Government, upon which the system of refund claims is in part based, require that provisions for claims for refund should be strictly enforced. The petitioner filed no claim for refund within the five-year period, and, therefore, is not entitled to recover.

ARGUMENT

I

THE PETITIONER DID NOT PLEAD AN ACCOUNT STATED

While the court below held that there was no basis for recovery on the theory of account stated, it also pointed out that the petition in that court failed to plead a cause of action based upon an account stated (R. 18, 25). Petitioner now asserts

that when the Commissioner approved the schedule of refunds and credits on March 29, 1924, an account was stated between the parties, and there arose an implied promise to pay to petitioner the sum of $13,502.90, of which he is now entitled to recover $2,628.26, the amount of the overassessment for 1919. We believe that upon the merits there was no basis for recovery on the theory of an account stated, but before coming to the merits we will consider the pleading.

The petition alleged (R. 3–4) that without warrant of law $13,502.90 of an overpayment allowed by the Commissioner had been credited against the additional 1917 tax of the partnership of Westheimer & Daube and asserted that such application was illegal because the statute of limitations had run against the assessment and collection of the partnership tax. The petition alleged that after March 29, 1924, the Commissioner found that the petitioner had overpaid his taxes by $24,780.14 for the year 1918 (R. 3). It was further alleged that this overpayment had been applied against additional taxes assessed against the petitioner for the years 1916 and 1917 (R. 3) and that this was unlawful. Petitioner alleged the application on August 7, 1924, by the collector of a check for $13,502.90 against the additional tax of the partnership for the year 1917 and a copy of a letter from the Treasury Department to the collector authorizing such

application dated July 28, 1924, was appended to the petition. There was no allegation that a certificate of overassessment had been issued (see *Bowcit Teller & Co.* v. *United States,* 283 U.S. 258), nor that by any action of the Commissioner or others an account had been stated to the petitioner on March 29, 1924. It is apparent that the cause of action alleged in the petition and the facts stated were designed to establish only that credit of the overassessment against the partnership deficiency was illegal because the statute of limitations had run against the collection of partnership taxes.

While recovery on the theory of account stated was asked at the argument, recovery could only be had on the facts pleaded. Judgment could not be based upon new grounds presented for the first time in argument. *Clark* v. *United States,* 95 U.S. 539, 543; *Electric Boat Co.* v. *United States,* 66 C.Cls. 333, 377; *Brown* v. *United States,* 1 C.Cls. 377. See also *Merritt* v. *United States,* 267 U.S. 338, 341. While special rules of pleading do not obtain in the Court of Claims (*Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190, 212), the rules of the court require that the petition must contain a plain statement of the facts upon which recovery is sought (R. 7), and Section 156 of the Judicial Code bars any claim " unless the petition setting forth a statement thereof " is filed within

six years. No amendment of the pleadings was asked or permitted by the court and in its opinion the Court said in effect that the pleadings did not raise the issue of an account stated.

Insistence upon proper pleading in such a case as this does not involve emphasis on mere form. It is apparent that the Commissioner's approval of the schedule of refunds and credits, upon which petitioner relies as an account stated, was due to a mistake. This is indicated in the opinion of the court below (R. 14, 15, 23, 24). There is, however, no finding that the Commissioner's action was due to mistake. Where a claim is based upon an account stated, it may be resisted by proof of fraud or mistake. *United States* v. *Kaufman*, 96 U.S. 567; *United States* v. *Savings Bank*, 104 U.S. 728. The absence of a finding that the approval of the schedule of refunds and credits was due to mistake seems clearly to be due to the fact that when the proofs were submitted the case was not tried on the theory of an account stated.[1] Thus the Government was deprived of a defense which it was entitled to make by the deficiencies of the petition and they ought not now to be disregarded. Accordingly, we submit that, since petitioner failed to plead any facts designed to raise an issue as to the existence of an account stated, the question should not be considered on the merits in this case.

[1] The decision of the Court in *Bonwit Teller & Co.* v. *United States*, *supra*, was not rendered until after proofs in the instant case were completed.

II

THERE WAS NO ACCOUNT STATED UPON WHICH RECOVERY COULD BE PREDICATED

Petitioner asserts that he is entitled to recover in this case upon an account stated and relies principally upon the decision in *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, *supra*. In that case an informal claim for refund had been filed which the Commissioner regarded as sufficient, and a certificate of overassessment had been delivered to the taxpayer within six years from the commencement of the action. This Court held that the Commissioner's action in accepting the informal claim for refund as sufficient was binding on the United States, that such claim would have authorized him to make the refund voluntarily, and that Section 3226 did not bar the suit upon the certificate of overassessment as an account stated. The taxpayer had properly pleaded an account stated arising from delivery of the certificate.

We believe that the *Bonwit Teller* case is clearly distinguishable and that the court below correctly held that it furnished no ground for recovery in this case. No formal or informal claim for refund was timely filed in the instant case. Furthermore there was no proof that a certificate of overassessment was ever delivered to the petitioner. So far as appears none was delivered. The issuance of such a certificate was not pleaded nor was it found by the court below. We believe that under the *Bon-*

wit Teller decision there can be no recovery of taxes overpaid on an account stated against the United States except upon a certificate of overassessment which has been delivered to the taxpayer. The *Bonwit Teller* case has been so interpreted by the Circuit Court of Appeals for the Third Circuit. *W. J. Friday & Co.* v. *United States,* 61 F. (2d) 370.

The delivery to the taxpayer of a certificate of overassessment as a prerequisite to recovery on the theory of account stated is required by familiar common-law principles upon which such an action is founded and the necessity of such delivery as a foundation for the action is demonstrated by consideration of the function of a certificate of overassessment in the administration of the revenue laws.

An account stated is a contract, "a promise by a debtor to pay a stated sum of money which the parties had agreed upon as the amount due." *Williston on Contracts,* Sec. 1862; *Middeditch* v. *Ellis,* 2 Exch. 623. The element of agreement between the parties is essential to the creation of an account stated. *Rodkinson* v. *Haecker,* 248 N.Y. 480, 484–485; *Chinn* v. *Lewin,* 16 F. (2d) 512, 515 (App. D.C.); *Wilbur* v. *Win,* 89 N.J. Eq. 278, 282; *A. Krolik & Co.* v. *Ossowski,* 213 Mich. 1, 7, 8; *Barton Cotton Co.* v. *Vardell,* 217 Mo. App. 691, 702; *Lockwood* v. *Thorne,* 18 N.Y. 285, 288; *Gardner* v. *Watson,* 170 Cal. 570, 574. Thus an account does not

become stated merely upon its being rendered, but it must be assented to by the party receiving it, be he the debtor or the creditor. *Toland* v. *Sprague,* 12 Pet. 300, 335. It follows, therefore, that it is necessary that the statement of the account be communicated in some way or submitted by one party to the other. *Nutt* v. *United States,* 125 U.S. 650, 655; *Joshua Hendy Iron Works* v. *Brenneman,* 185 Fed. 183 (C.C.S.D.N.Y.). An uncommunicated acknowledgment of liability cannot be the basis of an account stated. *Parker* v. *Merchants & Insurance Reporting Co.,* 44 Cal. App. 214. The communication or submission may take the form of a statement of account and demand by the creditor, or it may be a rendition of account by the debtor to the creditor (*Williston on Contracts,* Sec. 1863), but it is obvious that it must take one or the other form before agreement upon the account is possible. *Parker* v. *Merchants & Insurance Reporting Co., supra.*

The procedure for the official determination and announcement of overassessments under the Revenue Acts is fully set forth in the opinion of this Court in *United States* v. *Swift & Co.,* 282 U.S. 468, 471–473. As there indicated, the action of the Commissioner in preparing a schedule of overassessments and certificates thereof, the transmission of such schedules and certificates to the collector, their return with appropriate notations thereon to the Commissioner, and the Commissioner's action

in approving the schedule of refunds and credits are all preliminary intra-departmental steps which precede the issuance to the taxpayer of a certificate of overassessment. As the Court said in the *Swift* case (p. 473): "The first official notification which the taxpayer received as to how his account had been handled with respect to abatement, credit, refund and interest was the certificate of overassessment which accompanied the check for the payment due him, if any." It was further pointed out that if no check accompanied the certificate, the certificate of overassessment as issued bore notations showing the credits which had been made.

Thus, since the essential basis of liability upon an account stated is the agreement of the parties upon the account, it is only the final action of the officers charged with the administration of the revenue laws which could constitute the agreement on the part of the United States to the account as prepared and rendered by such officers. Only the certificate of overassessment when actually issued could constitute the communication of this account to the taxpayer. Thus, under the practice in the administration of the revenue laws, we believe that a certificate of overassessment actually delivered to the taxpayer is the only statement of an account which can give rise to a cause of action upon an account stated.

The petitioner contends that recovery may be had, although no certificate of overassessment was

issued, on the theory that the Commissioner's final action was taken when he approved the schedule of refunds and credits on March 29, 1924. But, as indicated in the opinion of the Court in the *Swift* case, this action of the Commissioner was not, under the Bureau practice, communicated to the taxpayer. No implied agreement thereon could arise until such communication, and no communication occurred until a certificate of overassessment reflecting the Commissioner's action was actually delivered to the taxpayer. There was still a possibility that the Commissioner's action might be revised. See *Lewis* v. *Reynolds,* 284 U.S. 281, 283; *United States* v. *Memphis Oil Co.,* No. 308, October Term, 1932, decided January 9, 1933. *Burnet* v. *Porter,* 283 U.S. 230; see also *Botany Mills* v. *United States,* 278 U.S. 282. The right of the Commissioner to reconsider his action and make a further assessment has been upheld even after a refund is paid. *Austin Co.* v. *Commissioner,* 35 F. (2d) 910 (C.C.A. 6th), certiorari denied, 281 U.S. 735; see also *Ridgway* v. *United States,* 18 C. Cls. 707.

The only communication received by the petitioner containing any reference to the amount in suit was a letter dated November 10, 1923, notifying the petitioner of overassessments for the years 1918 and 1919, amounting to $24,780.14. This was the usual "thirty-day" letter. Its terms did not indicate that it represented the final action of the Treasury Department, but on the contrary clearly

showed that it was not definitive. Obviously such a letter cannot be regarded as a final statement of the account between a taxpayer and the United States which gives rise to an implied promise which may be enforced. *Phillipsborn* v. *United States*, 72 C. Cls. 545, certiorari denied, 285 U.S. 548.

The impossibility of regarding any official action short of the actual issuance of the certificate of overassessment as such final action of the officers of the United States that an account stated arises, is demonstrated by the course of events in this case. In connection with the schedule of refunds and credits which the Commissioner approved on March 29, 1924, he authorized payment to the petitioner of the amount shown by the schedule to be refundable, although at that time there was on file an agreement authorizing the application of petitioner's overpayment for 1918 to the additional assessment against the partnership. Pursuant to the authorization so given, a check was issued and forwarded to the collector for delivery to the petitioner (R. 10). The collector, however, returned the check without delivering it, and, recognizing his mistake, the Commissioner on July 28, 1924, instructed the collector to apply the amount of the overpayment to the partnership tax liability. If the Commissioner's action in approving the schedule of refunds and credits is to be regarded as an account stated, giving rise to an implied promise by the United States to pay the amount shown thereon, the

Commissioner is denied the opportunity to correct such mistakes, although the taxpayer has not been notified of the Commissioner's original or subsequent action. It is not a sufficient solution of this difficulty to say that in an action on account stated, based upon such a schedule, the United States could prove the mistake and thus avoid liability, because this involves an assumption of a burden of proof on the part of the United States which it should not be required to bear. Such mistakes are always subject to correction while the matter remains in the hands of the administrative officers and before final and official notification to the taxpayer and possibly afterwards. At least until such notification, the taxpayer has received no promise, express or implied, based upon the verity of the account.

The cases upon which petitioner relies to establish that the common-law rules as to liability on accounts stated are relaxed in such cases as this are clearly distinguishable. In *United States* v. *Kaufman*, 96 U.S. 567, a claim was presented and allowed, and the claimant was notified of the allowance, thus establishing an account which both parties agreed was correct. See *Kaufman* v. *United States*, 11 C.Cls. 659, 662. In *United States* v. *Savings Bank*, 104 U.S. 728, there was an appeal to the Commissioner which the Commissioner allowed and certified for payment. Apparently the certificate was issued to the taxpayer and payment was refused

by an accounting officer. Thus the certificate there held to give rise to a liability on an account stated was similar to a certificate of overassessment issued to a taxpayer. In *First National Bank of Greencastle* v. *United States,* 15 C.Cls. 225, the Commissioner took final action and issued his certificate for payment, payment being refused by an accounting officer. In all of these cases the official charged with the duty of passing on the claim took final action and payment was arbitrarily refused by accounting officers of the Government. Thus, in effect, the accounting officers acted in derogation of the authority of the officers charged with responsibility for determining whether refund should be made, although no appeal by the United States from the action of such officer was provided. The distinction between such cases and cases where the Commissioner retains control and may change his decision is clear. See *Ridgway* v. *United States,* 18 C.Cls. 707, *supra.* As in the *Ridgway* case, here the Commissioner himself has undertaken to correct a mistake, before any notification of his action was given to the petitioner, and before the matter had passed from the Commissioner's control.

Cases which recognize that for some special purposes the Commissioner's action on the schedule of refunds and credits constitutes his final administrative act where the date of his final action determines the commencement of periods of limitation

or the commencement of interest, are not in point. *United States* v. *Swift & Co.*, 282 U.S. 468, *supra; Girard Trust Co.* v. *United States*, 270 U.S. 163; see *Colgate-Palmolive-Peet Co.* v. *United States*, 58 F. (2d) 499 (C.Cls.). Those cases do not involve actions upon accounts stated and do not suggest any reason for the relaxation of common-law rules relating to accounts stated. While the decision in *Bonwit Teller & Co.* v. *United States, supra*, sustained an action upon an account stated against the United States, where there had been compliance with the statutes with respect to claims for refund, and where there had been delivery to the taxpayer of a certificate showing final action and the conclusion that the tax had been overpaid there is no justification for extending that ruling to a case like this in which there is nothing to support an account stated. Accordingly, we think the court below correctly denied recovery.

III

IF AN ACCOUNT STATED HAD BEEN PLEADED AND PROVED, NO RECOVERY COULD BE ALLOWED BECAUSE NO CLAIM FOR REFUND WAS FILED WITHIN THE STATUTORY PERIOD

If the Commissioner's action in approving the schedule of refunds and credits could be regarded as the statement of an account upon which action could be brought, we believe that the petitioner must necessarily fail because he did not file a claim for refund within the time prescribed in Section

252 of the Revenue Act of 1921[2] (*infra*, p. 29). So far as now material, that section provides:

> That if, upon examination of any return of income * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer; *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer. * * *

Section 3228 of the Revised Statutes, as amended by Section 1316 of the Revenue Act of 1921 (*infra*, p. 31), provided that all claims for refund or credit of taxes erroneously or illegally assessed or collected must be presented to the Commissioner of Internal Revenue within four years after payment.

Section 252, *supra*, permits the Commissioner to refund voluntarily any excess in taxes paid, provided such refund is actually made within five

[2] Substantially similar provisions are contained in the later Revenue Acts. Section 281, Revenue Act of 1924, 43 Stat. 253; Section 284, Revenue Act of 1926, 44 Stat. 9; Section 322, Revenue Act of 1928, 45 Stat. 791; Section 322, Revenue Act of 1932, 47 Stat. 169.

years from the date when the return was due. But it is our contention that, unless such refund is made within that period, no refund can thereafter be made voluntarily or ordered by any court, unless a claim for refund was filed within the five-year period, and that such prohibition applies to an action brought upon an account stated as fully as it does to any other remedy against the Government.

The petitioner filed no claim for refund of any part of his 1919 taxes within five years after the return was filed. The only claim for refund relating in any way to 1919 taxes ever filed by him was filed on February 26, 1930 (R. 11), which was almost ten years after the return for 1919 was due. Even then the petitioner filed no separate claim for refund for the year 1919, but the amount of the overassessment for 1919, $2,628.26, was included in the figure stated in the refund claim for 1918.

Section 252 of the Revenue Act of 1921, *supra*, precisely defines the circumstances under which refunds may be made and limits the authority of the Commissioner and the courts to dispose of revenues of the United States already collected. The provision before the first proviso in that section deals with administrative refunds, that is, those which may be determined and made by the Commissioner voluntarily. See *Fox* v. *Edwards*, 287 Fed. 669 (C.C.A. 2d); *J. H. Williams & Co.* v. *United States*, 46 F. (2d) 155 (E.D.N.Y.); cf. *Lucker* v. *United States*, 53 F. (2d) 418 (C.Cls.).

The proviso, however, specifically limits his authority to allow or make such refunds after five years from the date the return was due to cases where a claim for refund has been filed within that period. The prohibition of the statute is not limited to the allowances made after five years, but the making of refunds is also prohibited. This prohibition, we believe, is absolute and applies to all cases, including those in which allowance occurs within the five-year period. The distinction between purely administrative remedies, where the rights which administrative officers may recognize are non-justiciable, and cases where the courts may intervene, has often been recognized in connection with the revenue laws. See *Chesebrough* v. *United States*, 192 U.S. 253, 263–264; *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, Nos. 476 to 478, October Term, 1932, decided March 13, 1933.

We believe that it is clear under Section 252 that, in the absence of a claim for refund filed within five years after the return was due, the Commissioner would be without authority after that time to allow a refund and issue a certificate of overassessment upon which an action could be maintained against the United States as upon an account stated. Such a certificate, if issued, would be a nullity. Upon the same reasoning, a certificate of overassessment issued before the expiration of the

five-year period could not be the basis of action against the United States in a suit brought after the five-year period, unless a claim for refund had been filed within five years. If an action might be maintained upon such a certificate and recovery allowed, a refund would be "made after five years from the date when the return was due", but this the statute prohibits. The fact that suit on an account stated is predicated on the Commissioner's determination as evidenced by the certificate prevents the statute of limitations applicable to suits for the recovery of taxes illegally collected (R.S. Sec. 3226) from applying (*Bonwit Teller & Co.* v. *United States, supra*), but recovery in such a suit is certainly the recovery of taxes shown on the certificate as overpaid and thus involves the making of a refund.

The view that any refund made after the five-year period without a claim for refund is unauthorized finds support in the provisions of Sections 608 and 610 of the Revenue Act of 1928 (*infra*, pp. 32–33), which provide that if the Commissioner makes a refund which is erroneous because made "after the expiration of the period of limitation for filing claim therefor", the United States may recover the amount of such refund under Section 610. If, as we contend, no action could be maintained on a certificate, where no claim for refund was filed within five years, none could be maintained on

the intermediate action of the Commissioner in approving the schedule of refunds and credits.

The reason for the first proviso in Section 252 is clear. The requirement of claims for refund is an essential part of the system for administration of the revenue laws. Not only are such claims required by Section 252, but they are also required by Section 1316, amending Section 3228 of the Revised Statutes, and no suit may be maintained under Section 3226 of the Revised Statutes, as amended by Section 1318 of the Revenue Act of 1921, unless a claim for refund or credit has been duly filed. While the purpose of requirements that such claims must be clear and explicit is to enable the administrative officers to make prompt disposition thereof (see *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U.S. 269), the purpose of requiring such claims and that they shall be filed within a limited time is to protect the Federal revenues. See I.T. 1742, II–2 C.B. 229. When the time has expired, the revenues are beyond the reach of any taxpayer or any officer of Government.

The fiscal necessities upon which the system of requiring claims for refunds has been erected are not affected by the form of action which a taxpayer may bring to recover sums out of the Treasury. The requirement of a claim for refund is an essential prerequisite to suit under Section 3226 of the Revised Statutes. There is no reason for disre-

garding the same necessity for a claim for refund where the taxpayer relies on an account stated. Section 252 applies, we believe, to refunds sought on that theory as well as to those sought on any other. It is no more harsh to apply Section 252 to a taxpayer who has received notice that he has overpaid his tax through the allowance of a refund and deny recovery than it is to apply Section 3226 to deny recovery to another who also overpaid but whose claim was not allowed. Cf. *Ritter* v. *United States*, 28 F. (2d) 265 (C.C.A. 3rd). In both cases the Government retains funds to which it would not have been entitled if the taxpayers had acted promptly. But this is the system which Congress has established to guard the revenues, and the necessity of filing claims has been so long a familiar duty of taxpayers who seek redress that it should not be dispensed with here any more than where a taxpayer sues under Section 3226.

The petitioner apparently contends that the decision of this Court in *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, authorizes actions against the United States on accounts stated in the absence of a claim for refund filed in time. We find no basis for this interpretation of the decision. In the *Bonwit Teller* case the Court held that when an informal claim for refund had been accepted by the Commissioner, its informality could not be questioned by the United States, and the Commissioner,

having accepted such a claim, would be authorized to make refund voluntarily. It further held that where, after such an informal claim had been filed in time, a certificate of overassessment had been delivered to the taxpayer, an action on an account stated might be maintained upon such certificate, and that, in such an action, the statute of limitations as to actions under Section 3226 of the Revised Statutes, was inapplicable. The Court said (p. 264):

> The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim.

In the case suggested the Commissioner's determination that an informal claim was inadequate and could not be considered would, if the Commissioner was justified in rejecting the claim as inadequate, be the precise equivalent of a case where no claim was filed within the statutory period. Thus, we believe that in the *Bonwit Teller* case the Court left open and did not decide whether an action on account stated might be maintained if no timely claim for refund was filed.

So far as we know, the only decision dealing with the necessity for a claim for refund, where action is brought on the theory of account stated, is *W. J. Friday & Co.* v. *United States*, 61 F. (2d) 370 (C.C.A. 3d), where, without extended discus-

sion, the court held that in such a suit a claim for refund was unnecessary. We believe that this conclusion was erroneous, in view of the provisions of Section 252 of the Revenue Act of 1921. The question was left open in *Philipsborn* v. *United States,* 72 C.Cls. 545, certiorari denied, 285 U.S. 548, but there are indications in the opinion that the court considered a claim for refund to be necessary. In the present case, the court below held that there was no account stated, and that there could be no recovery in the absence of a claim for refund.

The paucity of decisions on the question may well be due to the fact that prior to the decision of this Court in the *Bonwit Teller* case it was generally assumed that all actions to recover taxes illegally assessed and collected should be brought under Section 3226 of the Revised Statutes, and the action upon an account stated, which had been recognized in several early decisions, had apparently not been resorted to for many years. Since the *Bonwit Teller* decision, it has been urged in the Court of Claims in a number of cases that recovery may be predicated upon an account stated in cases where the failure of the taxpayer to protect his rights would otherwise require denial of recovery. The Court of Claims has not, so far as we are aware, allowed recovery in any case based upon an account stated where a timely claim for refund was not filed. It seems reasonable to suppose that the ques-

tion will be presented with recurring frequency until the precise limitations of the rule announced in the *Bonwit Teller* case are defined by this Court.

CONCLUSION

The judgment of the court below was correct and should be affirmed.

Respectfully submitted.

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April, 1933.

APPENDIX

STATUTE INVOLVED

REVENUE ACT OF 1921, C. 136, 42 STAT. 227, 268, 314

SEC. 252:

That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes", the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further*, That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue

Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further,* That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (*a*) of section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under section 252 of the Revenue Act of 1918.

Section 1315 (U.S.C., Title 26, Sec. 149):

That section 3220 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor,

assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

Section 1316 (U.S.C., Title 26, Sec. 157):

That section 3228 of the Revised Statutes is amended to read as follows:

"SEC. 3228. All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

Section 1318 (U.S.C., Title 26, Sec. 156):

That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commis-

sioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."

This section shall not affect any suit or proceedings instituted prior to the passage of this Act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress.

Sections 608 and 610 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provide:

> SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.
>
> A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—
>
> (a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or
>
> (b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—
>
> (1) within such period suit was begun by the taxpayer, or
>
> (2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limita-

tions for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U.S.C. Sup. VI, Title 26, Sec. 1674.)

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U.S.C. Sup. VI, Title 26, Sec. 1646.)

U. S. GOVERNMENT PRINTING OFFICE 1933

SUPREME COURT OF THE UNITED STATES.

No. 634.—October Term, 1932.

David Daube, Petitioner,
vs.
The United States, Respondent.

On Writ of Certiorari to the Court of Claims.

[May 8, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner brought suit in the Court of Claims upon a claim that for two years, 1918 and 1919, he had overpaid his income tax. As to the tax for 1918, the claim was dismissed upon the merits. As to the tax for 1919, it was dismissed upon the ground that suit had not been brought within the time prescribed by law. 59 F. (2d) 842; 1 F. Supp. 771. A writ of certiorari, restricted to the assessment for 1919, brings the case here.

The Commissioner upon an audit of the petitioner's returns found underassessments for 1916, 1917, and 1920, and overassessments for 1918 and 1919. A notice of the result of the audit was mailed to the petitioner on November 10, 1923, the notice by its terms being provisional and tentative. Later, and on January 31, 1924, the Commissioner signed a schedule of overassessments, $22,151.88 for 1918, and $2,628.26 for 1919, and forwarded the schedule to the Collector of the District of Oklahoma, the petitioner's residence. In accordance with the practice of the bureau, the Collector was instructed to examine the accounts of the taxpayer and apply the excess payments as a credit against taxes due for other years. Upon such examination the Collector found that there were additional assessments, still unpaid, for 1916, 1917, and 1920, in the sum of $11,277.24. This left an excess for 1918 of $10,874.64, and one of $2,628.26 for 1919, a total of $13,502.90. Upon that basis the Collector made out a schedule of refunds and credits, which he returned to the Commissioner with the schedule of overassessments.

At this stage complications developed by reason of the tax liability of a partnership of which petitioner was a member. The

partnership owed the Government more than fifty thousand dollars, the amount of an excess profits tax for 1917, though the precise extent of the indebtedness was still undetermined. In anticipation of an assessment, petitioner had filed with the bureau an agreement and direction that any refund due to him individually for the year 1918 (but without mention of any other year) should be applied as a credit upon the taxes owing from the partnership. When the schedule of refunds and credits came back from the Collector, the Commissioner overlooked the order, then on file in his office, for the merger of the two accounts, and dealt with them as separate. He made an additional assessment against the partnership for $53,012.47. On the same day, March 29, 1924, he signed an approval of the schedule of refunds and credits without applying any part of the overpayment to the partnership liability, and made out a check to the order of the petitioner for $13,502.90, which he mailed to the Collector. The Collector discovered the mistake, and instead of delivering the check returned it to the Commissioner. Thereupon the Commissioner canceled the check, revoked his earlier instructions, and ordered the Collector to apply the overpayments made by the petitioner individually upon the deficiency then owing from the members of the partnership. This order was proper to the extent of $10,874.64, the 1918 overpayment, for the credit to that extent was in accordance with the petitioner's agreement. It was an error in so far as it included the 1919 overpayment ($2,628.26), for the petitioner's agreement did not cover that year. The Collector did what the Commissioner commanded. No notice, however, of his action was transmitted to the taxpayer. There was no delivery to the taxpayer of a certificate of overassessment. There was no delivery of a copy of any schedule of refunds and credits. Six years went by, almost to the day, without demand or protest. Then, on March 28, 1930, the petitioner began this suit, asking judgment for $24,780.14 with interest. He repudiated all the credits against the partnership deficiency, as well as other credits which there is no need to go into, for he allowed them later on. At the trial the contest narrowed down to two items. The first, $10,874.64, is the overpayment for 1918, as it stood before it was applied upon the partnership assessment. The second, $2,628.26, is the overpayment for 1919. The writ of certiorari brings up the second item to the exclusion of any other.

By section 3226 of the Revised Statutes as amended by the Revenue Act of 1921, no suit may be maintained for the recovery of any internal revenue tax erroneously or illegally assessed or collected unless begun within five years from the date of payment. Revenue Act of 1921, c. 136, 42 Stat. 268, sec. 1318, amending R. S. sec. 3226; 26 U. S. Code, sec. 156. This suit was not brought within the time so limited. It is therefor too late, if it is a suit for the recovery of a tax within the meaning of the statute. The petitioner insists that it is not such a suit, but one upon an account stated. The statement of an account gives rise to a new cause of action with a new term of limitation. *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265. We are thus brought to the question whether there was such a statement here.

If the traditional tests, familiar to the law of contracts, are to be accepted as our guide, there was no account stated between Government and taxpayer. No balance was arrived at as the result of computation and agreement. *Volkening* v. *DeGraaf*, 81 N. Y. 268, 271. The Commissioner did not inform the taxpayer that the tax had been overpaid in a determinate amount. The taxpayer did not give assent either expressly or by silence to the outcome of the audit. The essentials of an account stated in any strict or proper sense are lacking altogether. *Toland* v. *Sprague*, 12 Pet. 300, 333; *Nutt* v. *United States*, 125 U. S. 650, 655; *Volkening* v. *DeGraaf, supra; Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 511, 512. A different situation was disclosed in the *Bonwit Teller* case, *supra*. There the certificate of overassessment had been delivered to the taxpayer. "Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought." *Bonwit Teller & Co.* v. *United States*, *supra*, p. 265. Cf. *W. J. Friday & Co., Inc.* v. *United States*, 61 F. (2d) 370.

The argument is made, however, that the allowance of the schedule of refunds and credits on March 29, 1924, was something near to an account stated, something "equivalent" thereto, though not the standard article to be marked by the standard label. This doctrine of equivalence is borne out, we are told, by cases in this court and elsewhere, which were cited in the *Bonwit Teller* case and are again pressed upon us now. *United States* v. *Kaufman*, 96 U. S. 567, 575; *United States* v. *Savings Bank*, 104 U. S. 728; *First National Bank of Greencastle* v. *United States*, 15 Ct. Cls. 225.

They fall short by a great deal of teaching such a lesson. The *Kaufman* case will serve as typical of the others, for they vary little in their facts. The Commissioner of Internal Revenue had been authorized by statute to make allowance to brewers for the value of tax stamps lost or wasted. He did make such an allowance, and certified his ruling to the Comptroller of the Treasury. The claimant suing in the Court of Claims to recover the amount of the award was met by the objection that he must prove his claim anew. This court held that the allowance by the Commissioner was effective without more to make out a *prima facie* case, and spoke of it as at least "equivalent to an account stated between private parties, which is good until impeached for fraud or mistake." There was no question in the case as to the effect of the allowance in lifting the bar of a statute of limitations. The claim had been seasonably filed and diligently pressed. There was no question as to the effect of revocation or rescission. *Cf. Ridgway* v. *United States*, 18 Ct. Cls. 707, 714, 715. What had been done by the Commissioner had never been undone. There was only the question as to the probative force of an adjudication by an officer who had been appointed to decide and had definitively decided. The statute had given him the position of an administrative tribunal. He had done all that he could do. He had made the allowance and had certified his action to the disbursing agents of the treasury, whose duty was not to revise, but merely to obey. Notice of his action had been given to the claimant, who had accepted and approved it. *Kaufman* v. *United States*, 11 Ct. Cls. 659, 662. The suit was on an award which had all the finality and authority that an award could ever gain.

A very different situation is laid before us here. No definitive adjudication in favor of this taxpayer was ever made by the Commissioner or by other competent authority. The transaction never went beyond the stage of intra-departmental conference and parley. The Commissioner had put his hand, it is true, to a schedule of refunds and credits, and had transmitted a check to one of his subordinates to be delivered to the claimant. By none of these acts had he so divested himself of control as to generate rights or interests in favor of the taxpayer if there was revocation or rescission in advance of notice or delivery. There had been messages back and forth between the officers and branches of an administrative bureau. There had been none to the outer world. The Com-

missioner, after signing the schedule, might scratch out his signature, and declare it inadvertent. *Cf. Ridgway* v. *United States, supra; Austin Co.* v. *Commissioner*, 35 F. (2d) 910. This in substance is what he did. After signing a check and mailing it to his agent, he might cancel the check while the agent still held it, and revoke the authority improvidently granted. The matter was still *in fieri*.

High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended. By the ruling in the *Bonwit Teller* case a specific limitation applicable to claims for the recovery of taxes is set aside and superseded whenever the statement of an account sustains the inference of an agreement that the tax shall be repaid. As soon as this appears, a fresh term of limitation is born and set in motion. It is a ruling not to be extended through an enlargement of the concept of an account stated by latitudinarian construction.

Girard Trust Company v. *United States*, 270 U. S. 163, and *United States* v. *Swift & Company*, 282 U. S. 468, are pressed upon us by counsel as helpful to the taxpayer. They do not touch the case at hand. In the case of the *Girard Trust Company*, a statute called for interest on the amount of the refund to the date of allowance. The claimant made the point that allowance was not perfected unless accompanied by payment, and that interest on the refund should be correspondingly extended. The court rejecting that contention held that allowance was complete within the meaning of the statute when the schedule of refunds was approved by the Commissioner. In the case of *Swift & Company*, a like ruling was made as to the effect of the approval of a credit. In neither case was there any question as to the existence of an account stated, or as to the effect of an improvident allowance, unknown to the taxpayer.

The judgment is

Affirmed.